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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 297

DIXILYN DRILLING CORPORATION, PETITIONER,

vs.

CRESCENT TOWING & SALVAGE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 4, 1962

CERTIORARI GRANTED OCTOBER 15, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Number 871 In Admiralty

LIBEL—Filed December 22, 1958

To the Honorable Sidney C. Mize, Judge of the United States District Court for the Southern District of Mississippi

The Libel and Complaint of Mississippi State Highway Commission, City of Natchez, Mississippi and Department of Highways of the State of Louisiana

against

Dixilyn Drilling Corporation, Inc. and Crescent Towing & Salvage Company, Inc., alleges upon information and belief as follows:

First: The Mississippi State Highway Commission is a department of the State of Mississippi, created under and by virtue of the laws of the State of Mississippi, domiciled in the City of Jackson, County of Hinds, State of Mississippi; the City of Natchez is a Municipal Corporation chartered under and by virtue of the laws of the State of Mississippi, having its domicile in Adams County, State of [fol. 3] Mississippi; the Department of Highways of the State of Louisiana is a department of the State of Louisiana, created under and by virtue of the laws of the State of Louisiana, domiciled in the City of Baton Rouge, Parish of East Baton Rouge, State of Louisiana.

Second: The libelee or respondent, Dixilyn Drilling Corporation, Inc. with offices at 100 West 10th Street, Wilmington, Delaware, is a corporation organized under and by virtue of the laws of the State of Delaware, is authorized to and is doing business in the State of Mississippi, and has designated as its resident agent for process the C T Corporation System, 118 North Congress Street, Jackson, Hinds County, Mississippi; the libelee or respondent, Crescent Towing & Salvage Company, Inc. is a corpora-

tion organized under and by virtue of the laws of the State of Louisiana, having its domicile and principal office in the City of New Orleans, Parish of Orleans, State of Louisiana, with offices at 427 Balter Building, New Orleans, Louisiana, and, at the time of the collision hereinafter described, was traveling upon and using a public highway of the State of Mississippi, and who, by virtue of the exercise of the privilege of traveling upon and using a public highway of the State of Mississippi consented and designated as its resident agent for process, in Mississippi, the Secretary of State of the State of Mississippi.

[fol. 4] Third: The interests of the party libelants in this cause are as follows, to-wit:

1. The legal title, together with a reversionary equitable title, in and to the Natchez-Vidalia Bridge hereinafter described, is vested in the libelant, City of Natchez, Mississippi.

2. The present legal and equitable owners of the claim made by this libel are libelants, Mississippi State Highway Commission and Department of Highways of the State of Louisiana.

Fourth: By way of explanation as to the interests of the libelants as alleged in Paragraph Third of this libel, libelants state as follows:

The libelant, City of Natchez, Mississippi, is the lawful owner of said bridge, which it constructed many years ago at a huge cost, but pursuant to the laws of the State of Mississippi, particularly House Bill No. 77, Laws of 1952, the State Highway Commission of Mississippi was authorized and empowered, jointly with the Department of Highways of the State of Louisiana, to take over, assume jurisdiction of, operate, maintain, repair and improve the Natchez-Vidalia Bridge upon certain terms and conditions contained in said Act; by Act 199 of the 1952 Regular Legislative Session of Louisiana, the Department of Highways of the State of Louisiana was likewise authorized and empowered, jointly with the State of Mississippi, to take [fol. 5] over, assume jurisdiction of, operate, maintain, repair and improve the Natchez-Vidalia Bridge. Said Acts

also authorized and empowered the Department of Highways of the State of Louisiana and the Mississippi State Highway Commission to enter into an agreement whereby either one of the said departments might carry out the obligations and duties required of them under said Acts and charge the other with their proportionate cost thereof. Pursuant to the aforesaid laws of Mississippi and Louisiana the libelant herein, City of Natchez, Mississippi, on September 26, 1952, joined in an agreement by and between the aforesaid respective departments of Mississippi and Louisiana, whereby the Mississippi State Highway Commission agreed to be the agency which should henceforth perform or cause to be performed all work necessary to maintain and repair the aforesaid bridge, and the Louisiana Department of Highways, pursuant and subject to said agreement, would be liable for payment of fifty percent (50%) of the costs of such repair, maintenance, etc.

The City of Natchez, Mississippi, acting through and by its then Mayor, Walter P. Abbott, having been duly authorized by resolution by the Mayor and Board of Aldermen of the City of Natchez, adopted September 17, 1952, joined in the aforesaid agreement and by said agreement the City of Natchez relinquished and surrendered jurisdiction of said bridge and said approaches as therein set forth and described unto the Mississippi State Highway [fol. 6] Commission and the Department of Highways of the State of Louisiana and by said agreement and laws of the State of Mississippi and the State of Louisiana, said City was released from any further responsibility or liability for the operation, maintenance, repair and improvement of the said bridge and its approaches as described in said agreement; provided, however, if at any time following the date of said agreement said bridge should cease to be operated as a toll-free bridge, then, in that event, at the option of the governing authorities of said City, all rights and interests in said bridge and its approaches aforesaid would immediately and automatically revest in and revert to the said City of Natchez, Mississippi, all at the option of the governing authorities of the city and as provided by House Bill No. 77 of 1952 Regular Session of the Mississippi Legislature.

Fifth: On the early morning of December 27th at about 8:15 o'clock a.m., 1957, the libelees or respondents were engaged in towing a large offshore drilling rig along and upon the Mississippi River from Vicksburg, Mississippi to and through the mouth of the Mississippi River to a destination unknown to libelants, and at the aforesaid time approached the Natchez-Vidalia Bridge that spans the Mississippi River from the city limits of Natchez, Mississippi to the city limits of Vidalia, Louisiana. That said offshore drilling rig was owned by the libelee or respondent, Dixilyn Drilling Corporation, Inc., and was under [fol. 7] the exclusive control of the agents, servants and employees of the said Dixilyn Drilling Corporation, Inc., and said offshore drilling rig was being towed by three (3) tug boats under the exclusive control of the agents, servants and employees of the libelee or respondent, Crescent Towing and Salvage Company, Inc.; that the libelees' or respondents' agents, servants and employees were jointly in charge of and controlling the entire operation of the moving of the offshore drilling rig along the Mississippi River, on the Mississippi side thereof, at the time aforesaid, and while so doing were acting within the scope of their employment with the libelees or respondents and in the furtherance of the business of their respective masters or employers, the libelees.

Sixth: That as the said tug boats and offshore drilling rig or barge approached the Natchez-Vidalia Bridge, on the date mentioned in Paragraph Fifth hereof, the agents, servants and employees of Dixilyn Drilling Corporation, Inc., who were on board the said barge "Julia Anne", and whose duty it was to raise or lower the members or legs of said offshore drilling rig when required, negligently failed and neglected to lower one of the three (3) members or legs of said rig or barge a sufficient distance to clear the lower structure member of said bridge, and the agents, servants and employees of Crescent Towing and Salvage Company, Inc., on board the tugboats "Toltex", "Ouachita" and "Orleans" negligently failed to stop said barge when [fol. 8] it became apparent that the highest projected leg would strike the lower structure of the aforesaid bridge,

but permitted said barge to continue on its course down stream until said member or leg of the said offshore drilling rig or barge collided with the lower structure of said bridge, causing damages to said bridge as hereinafter set forth.

Seventh: The aforesaid collision and resulting damages as hereinafter described were not caused or contributed to by any fault or negligence on the part of the libelants, but were due wholly to and caused solely by the negligence of the libelees or respondents, through the neglect of their agents, servants and employees, in the following respects, among others which will be shown at the trial:

(1) The agents, servants and employees of the libelee or respondent, Dixilyn Drilling Corporation, Inc., failed and neglected to lower one of the members of the barge, "Julia Anne", a sufficient distance to clear the lower structure of the Natchez-Vidalia Bridge;

(2) The agents, servants and employees of the libelee or respondent, Crescent Towing and Salvage Company, Inc. did not have and maintain sufficient equipment to stop the movement of the offshore drilling rig when it became apparent that the same could not pass under the bridge without one of its vertical legs colliding with said bridge;

[fol. 9] (3) The agents, servants and employees of libelees or respondents did not take such steps as they could or should have taken to avoid the collision or mitigate the resulting damages.

Eighth: That in addition to the acts of negligence hereinafter set forth, libelants herein rely upon the doctrine of *res ipsa loquitur* to establish liability of the libelees or respondents for the damages hereinafter set forth.

Nineth: That the said offshore drilling rig, as it commenced passing under said bridge, violently collided with the lower chord of the upstream truss of the said bridge at the second span, on the Mississippi side of said river, between two (2) panels, seriously damaging two (2) mem-

bers of the lower chord; that said bridge was struck with great force and violence, and as a direct and proximate result of the aforesaid negligence the above described area of said bridge was damaged to such a degree as to create a condition that could likely cause danger to the entire bridge structure and to the traveling public of said bridge and river, and, in order to avoid and prevent further damages to said bridge and to the traveling public aforesaid, it was necessary that emergency steps be taken to repair said bridge.

Tenth: That said bridge was repaired under the supervision of the Mississippi State Highway Commission at a [fol. 10] cost to it of the sum of Forty-one Thousand Three Hundred Sixty-three and 24/100 Dollars ($41,363.24); that the costs aforesaid were necessary in order to restore the aforesaid bridge to the condition in which it existed immediately prior to the collision and to prevent further and more serious damages thereto.

Eleventh: The libelants bring this libel by virtue of the laws of the United States, and elect to have this suit proceed in accordance with the principles of libel in personam.

Twelfth: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of this Honorable Court and of the United States.

Wherefore, libelants pray that process in due form of law according to the provisions of law may issue against the libelees or respondents herein and that they may be cited to appear and answer upon oath all and singular the matters aforesaid and that this Honorable Court may be pleased to decree that the libelants, or the libelant, Mississippi State Highway Commission, recover a judgment from and against the libelees or respondents in the full sum of Forty-one Thousand Three Hundred Sixty-three and 24/100 Dollars ($41,363.24), together with interest and costs; and that the libelants may have such other and further general re- [fol. 11] lief as a Court of Admiralty may deem proper in the premises.

Mississippi State Highway Commission, By: Attorney General of the State of Mississippi, Matthew Harper, Assistant Attorney General, of Counsel, Jackson, Mississippi;

City of Natchez, Mississippi, By: C. L. Collins, Attorney; 209 Fry Building, Natchez, Mississippi;

Department of Highways of the State of Louisiana, By: W. Crosby Pegus, Jr., D. Ross Banister, Philip K. Jones, and George W. Lester, of Counsel, By: C. L. Collins, of Counsel.

Duly sworn to by C. L. Collins, jurat omitted in printing.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT

ANSWER OF DIXILYN DRILLING CORPORATION, LIBELEE AND RESPONDENT—Filed March 4, 1959

Now Comes Dixilyn Drilling Corporation, one of the libelees and respondents, in the above styled and numbered action, by its attorneys, and for answer to the libel filed and exhibited against it herein would show unto the Court the following:

[fol. 13] 1. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the First paragraph of the libel.

2. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Second paragraph of the libel.

3. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Third paragraph of the libel.

4. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Fourth paragraph of the libel.

5. Libelee and respondent, Dixilyn Drilling Corporation, admits that on the early morning of December 27, 1957, a large, off-shore drilling rig owned by it and known as the "Julie Ann" was being towed by Crescent Towing & Salvage Co., Inc. upon the Mississippi River from Vicksburg, Mississippi, to the vicinity of New Orleans, Louisiana, but

Dixilyn Drilling Corporation denies that it was engaged in said towing operation, and would show unto the Court that said towing operation was under the sole and exclusive control of Crescent Towing & Salvage Co., Inc. which had sole and exclusive control over the movements of the "Julie Ann", and that the "Julie Ann" was not equipped with motive power to control its own movements but relied solely and exclusively on the tugs and/or towboats owned and [fol. 14] operated by Crescent Towing & Salvage Co., Inc. Said libelee and respondent, Dixilyn Drilling Corporation, denies that said off-shore drilling rig, at the time complained of, was under the exclusive control of the agents, servants and employees of Dixilyn Drilling Corporation, but admits that its said off-shore drilling rig was being towed by three boats which were under the exclusive control of the agents, servants and employees of Crescent Towing & Salvage Co., Inc. Said libelee and respondent, Dixilyn Drilling Corporation, denies that its agents, servants and employees were jointly in charge of and controlling the entire operation of the moving of the off-shore drilling rig along the Mississippi River, and would show that the moving of said drilling rig along the Mississippi River was under the sole and exclusive control of the agents, servants and employees of Crescent Towing & Salvage Co., Inc. Said libelee and respondent, Dixilyn Drilling Corporation, admits that it had employees on said off-shore drilling rig who would raise or lower the legs of said rig if and when instructed so to do by the agents, servants and employees of Crescent Towing & Salvage Co., Inc.

6. The libelee and respondent, Dixilyn Drilling Corporation, denies that as the tug boats and off-shore drilling rig approached the Natchez-Vidalia Bridge the agents, servants and employees of Dixilyn Drilling Corporation, who were on board the "Julie Ann" negligently failed and neglected to lower one of the three members or legs of said rig or [fol. 15] barge a sufficient distance to clear the lower structure member of said bridge, but would show unto the Court that the agents, servants and employees of Dixilyn Drilling Corporation, on the occasion complained of, followed and fully complied with the orders and instructions of the

agents, servants and employees of Crescent Towing & Salvage Co., Inc. in lowering the legs of said off-shore drilling rig. Said libelee and respondent, Dixilyn Drilling Corporation, admits that the agents, servants and employees of Crescent Towing & Salvage Co., Inc. failed to stop said barge and permitted said barge to continue on its course downstream until one member or leg of said off-shore drilling rig collided with the lower structure of said bridge.

7. Said libelee and respondent, Dixilyn Drilling Corporation, denies that said collision with said bridge and the resulting damages were due to or caused by any negligence of Dixilyn Drilling Corporation through the neglect of its agents, servants and employees. Said libelee and respondent, Dixilyn Drilling Corporation, denies that its agents, servants and employees failed and neglected to lower one of the members of the barge, "Julie Ann", a sufficient distance to clear the lower structure of the Natchez-Vidalia Bridge, and would show that its agents, servants and employees, in the lowering of the legs of said barge, were under the exclusive control of the agents, servants and employees of Crescent Towing & Salvage Co., Inc., and [fol. 16] that the agents, servants and employees of Dixilyn Drilling Corporation followed and fully complied with the orders and instructions of the agents, servants and employees of Crescent Towing & Salvage Co., Inc. with respect to the lowering of the legs of said barge prior to the collision complained of. Said Dixilyn Drilling Corporation would show that its servants, agents and employees were not allowed a reasonable or sufficient time by Crescent Towing & Salvage Co., Inc. to lower the legs of said barge after being instructed by the agents, servants and employees of Crescent Towing & Salvage Co., Inc. to do so. Said libelee and respondent, Dixilyn Drilling Corporation, further denies that the failure to lower a leg of said barge was a proximate cause of the collision and damage complained of. Said libelee and respondent, Dixilyn Drilling Corporation, admits, on information and belief, that the agents, servants and employees of Crescent Towing & Salvage Co., Inc. did not have and maintain sufficient equipment to stop the movement of the off-shore drilling rig

when it became apparent that same could not pass under the bridge without one of its vertical legs colliding with said bridge. Said libelee and respondent, Dixilyn Drilling Corporation, denies that its agents, servants and employees did not take such steps as they could or should have taken to avoid the collision or mitigate the resulting damages.

8. The libelee and respondent, Dixilyn Drilling Corporation, denies that the doctrine of res ipsa loquitur is ap- [fol. 17] plicable to establish liability against it for the damages complained of.

9. The libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Ninth paragraph of the libel.

10. The libelee and respondent, Dixilyn Drilling Corporation, denies that the damage to said bridge amounted to the sum of $41,363.24, and denies that the expenditure of said amount was necessary in order to restore the aforesaid bridge to the condition in which it existed immediately prior to the collision or to prevent further and more serious damages thereto.

11. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Eleventh paragraph of the libel.

12. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Twelfth paragraph of the libel.

13. The libelee and respondent, Dixilyn Drilling Corporation, denies that libelants are entitled to recover the sum of $41,363.24 or any other amount from it.

14. The libelee and respondent, Dixilyn Drilling Corporation, would further show that it was guilty of no negligence which proximately contributed to the collision and damages complained of, and that said collision and damages constitute an inevitable accident in so far as the liability of the [fol. 18] libelee and respondent, Dixilyn Drilling Corporation, is concerned.

15. The libelee and respondent, Dixilyn Drilling Corporation, would show that at the time complained of Crescent Towing & Salvage Co., Inc. was acting as a common carrier by water within the meaning of Part III of the Interstate Commerce Act.

Wherefore, libelee and respondent, Dixilyn Drilling Corporation, having fully answered moves that the libel filed and exhibited against it herein be dismissed and denied and that it be fully and finally discharged from further liability herein.

Dixilyn Drilling Corporation, By: Watkins & Eager, By Thos. H. Watkins, Attorneys for Libelee and Respondent, Dixilyn Drilling Corporation.

Duly sworn to by Thos. H. Watkins, jurat omitted in printing.

[fol. 19]

IN THE UNITED STATES DISTRICT COURT

ANSWER OF CRESCENT TOWING & SALVAGE CO. INC.—
Filed March 27, 1959

To the Honorable the United States District Court for the Western Division of the Southern District of Mississippi; and the Honorable Judges Thereof:

The answer of Crescent Towing & Salvage Co. Inc. to the libel of Mississippi State Highway Commission, City of [fol. 20] Natchez, Mississippi and Department of Highways of the State of Louisiana, in a cause of collision, civil and maritime, with respect represents that:

1.

Respondent admits the allegations of Paragraph 1 of the libel.

2.

Respondent admits the allegations of Paragraph 2 of the libel except that it denies that its offices are located at 427 Balter Building, New Orleans, and denies that, at

the time of the collision described in the libel, it was using a public highway of the State of Mississippi and thereby designated the Secretary of State of Mississippi as its Agent for service of process.

3.

Respondent admits the allegations of Paragraph 3 of the libel.

4.

Respondent admits the allegations of Paragraph 4 of the libel.

5.

Respondent denies the allegations of Paragraph 5 of the libel, except as may be hereinafter specially admitted.

6.

Respondent denies the allegations of Paragraph 6 of the libel except as may be hereinafter specially admitted.

[fol. 21]

7.

Respondent denies the allegations of Paragraph 7 of the libel except insofar as such allegations charge negligence to Dixilyn Drilling Corporation and its agents, servants, employees and representatives.

8.

Respondent shows that Paragraph 8 of the libel set forth a conclusion of law and that no answer thereto is required, but if an answer be required, respondent denies the allegations of Paragraph 8 of the libel.

9.

Respondent denies the allegations of Paragraph 9 of the libel except as hereinafter admitted.

10.

Respondent denies the allegations of Article 10 of the libel and calls for strict proof thereof.

11.

Respondent shows that Paragraph 11 of the libel expresses a conclusion of law and that it requires no answer.

12.

Respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but denies that the premises of the libel are true.

13.

Further answering the libel, respondent, Crescent Towing & Salvage Co. Inc. shows that at a date prior to [fol. 22] December 27, 1957, it entered into a contract with corespondent Dixilyn Drilling Corporation under and pursuant to the terms of which respondent agreed to furnish motive power to bring its non-self-propelled drilling barge Julie Ann from the plant of R. G. LeTourneau, Inc. at Vicksburg, Mississippi to New Orleans, Louisiana. Said drilling barge is a large, bulky structure, built in the shape of a triangle, two sides of which are approximately 194' in length and the third side of which is approximately 152' in length. The barge floats on a self-contained structure or pontoon, approximately 20' in depth. Mounted upon the deck of the pontoon or barge is all of the crew housing facilities, equipment and machinery necessary to operate the said barge as a self-contained platform for the purpose of drilling for oil or gas under the bed of a body of water. The barge is fitted with three legs approximately 175' in length, which legs, when fully elevated, extend approximately 155' over the deck of the barge, and affixed to the bottom of each of which is a large cylindrical steel drum or pontoon approximately 20' in diameter and approximately 20' in height. The Barge Julie Ann had been newly constructed by R. G. LeTourneau Company at Vicksburg, at a cost that respondent is informed and believes

and so alleges was in excess of one million dollars. Although the said barge had no motive power, it was equipped with a great deal of complex machinery and equipment, which required highly specialized knowledge for its [fol. 23] proper operation. Included in such machinery were the motors, gears and controls for raising and lowering the legs of the barge. Accordingly, during the trip downriver, the barge was manned and controlled by a crew of specialists in the operation of the barge's machinery, equipment and controls, said crew at all times being in the employ and acting solely for and on behalf of Dixilyn Drilling Corporation.

Prior to making up the tow so that the barge could be moved downriver, a towing bar or knee was installed by R. G. LeTourneau Company or Dixilyn Drilling Corporation across the keyway at the stern of the barge. In the presence of representatives of Dixilyn Drilling Corporation and with their approval, the tug Toltec, the tug Ouachita and the tug Orleans made up to the face of the bar. The said tugs, the makeup of the tow and all arrangements for the movement were approved in advance by representatives of Dixilyn Drilling Corporation.

Respondent admits that one of the legs of the Julie Ann struck the under side of the Natchez-Vidalia Bridge when it was being moved downriver. Respondent particularly denies that it or any of its agents, servants, employees or representatives, whether under its dominion and control or acting as borrowed servants and employees for Dixilyn Drilling Corporation, had any responsibility or jurisdiction over the maneuvering of the barge and/or the legs thereof; [fol. 24] and that the damage to the Bridge was caused solely and only by the negligence, lack of care and inattentiveness to duty exhibited by the agents, servants and employees of Dixilyn Drilling Corporation and the crew of the barge Julie Ann in failing properly and promptly to lower the legs of the barge so that a clearance under the lower side of the Bridge would be insured at the time that the barge was passing under the Bridge.

Respondent shows that under and pursuant to the terms of the contract entered into by and between Dixilyn Drilling Corporation and this respondent, the master, pilot and

crew of the tugs and all agents, servants, employees and representatives of this respondent were agreed to be the servants of the barge and its owners, and if they, or any of them, were negligent in any respect, which is denied, then this respondent, under the terms of its contract with Dixilyn Drilling Corporation, is not and may not be held liable for the damages sustained by the Bridge.

Wherefore respondent prays that it may be dismissed hence at libelant's cost.

And for such other and further relief as may be proper in this cause and this Honorable Court competent to grant.

Brunini, Everett, Grantham & Quin, By Billy H. Quin, First National Bank Building, Vicksburg, Mississippi;

[fol. 25]

Lemle & Kelleher, By Charles Kohlmeyer, Jr., 1836 National Bank of Commerce Bldg., New Orleans, Louisiana;

Proctors for Crescent Towing & Salvage Co. Inc., Respondent.

Duly sworn to by Billy H. Quin, jurat omitted in printing.

[fol. 26]

IN THE UNITED STATES DISTRICT COURT

PETITION OF CRESCENT TOWING & SALVAGE CO., INC.— Filed March 27, 1959

To the Honorable the United States District Court for the Western Division of the Southern District of Mississippi; and the Honorable Judges Thereof:

The petition of Crescent Towing & Salvage Co. Inc. filed under the 56th Admiralty Rule promulgated by the United States Supreme Court against Dixilyn Drilling Corporation, Inc., in a cause of collision, civil and maritime, with respect represents that:

1.

At all times hereinafter mentioned, petitioner Crescent Towing & Salvage Co. Inc. was and now is a corporation organized under the laws of Louisiana with its offices and principal place of business in New Orleans.

2.

At all times hereinafter mentioned, respondent-impleaded, Dixilyn Drilling Corporation, was and still is a corporation organized under the laws of the State of Delaware, authorized to do and doing business in the State of Mississippi with offices and a resident agent for service of process located in Jackson, Hinds County, Mississippi.

[fol. 27]

3.

On or about December 22, 1958 a libel was filed herein by Mississippi State Highway Commission, City of Natchez, Mississippi, and Department of Highways, State of Louisiana, as owners of the Natchez-Vidalia Bridge over the Mississippi River at or near Natchez, Mississippi, against Dixilyn Drilling Corporation and petitioner herein, alleging that the said bridge had been damaged to the extent of $41,363.24 by the negligence of either or both respondents, and seeking a recovery of said sum with interest and costs. Petitioner files this 56th Rule Petition simultaneously with the filing of its answer to the said libel.

4.

In the early part of December, 1957, petitioner was contacted by officials of Dixilyn Drilling Corporation (hereinafter referred to as respondent) and after negotiations, entered into an oral contract with respondent, confirmed by letters, under and pursuant to the terms of which petitioner agreed to furnish motive power to bring respondent's non-self-propelled drilling barge Julie Ann from the plant of R. G. LeTourneau, Inc. at Vicksburg, Mississippi to New Orleans, Louisiana, for a fixed and stated consideration, based upon the release and indemnification clauses and the insuring agreements incorporated

therein and hereinafter referred to. Said drilling barge is a large bulky structure, built in the shape of a triangle, two [fol. 28] sides of which are approximately 194′ in length and the third side of which is approximately 152′ in length. The barge floats on a self-contained structure or pontoon; approximately 20′ in depth. Mounted upon the deck of the pontoon or barge is all of the crew housing facilities, equipment and machinery necessary to operate the said barge as a self-contained platform for the purpose of drilling for oil or gas under the bed of a body of water. The barge is fitted with three legs approximately 175′ in length, which legs, when fully elevated, extend approximately 155′ over the deck of the barge, and affixed to the bottom of each of which is a large cylindrical steel drum or pontoon approximately 20′ in diameter and approximately 20′ in height. The barge Julie Ann had been newly constructed by R. G. LeTourneau Company at Vicksburg, at a cost that respondent is informed and believes and so alleges was in excess of one million dollars. Although the said barge had no motive power, it was equipped with a great deal of complex machinery and equipment which required highly specialized knowledge for its proper operation. Included in such machinery were the motors, gears and controls for raising and lowering the legs of the barge. Accordingly, during the trip downriver, the barge was manned and controlled by a crew of specialists in the operation of the barge's machinery, equipment and controls, said crew at all times being in the employ and acting solely for and on behalf of Dixilyn Drilling Corporation.

[fol. 29] 5.

Recognizing the fact that the barge presented unusual problems of towing, and that the movement of the barge along the River in the traffic and with the current running at the time when the proposed move was to take place was extremely hazardous, petitioner agreed to undertake the move but only on condition that it would furnish the motive power therefor, its master, agents, servants and employees to become and be, for the purposes of the towage, the agents, servants, employees and representatives of respon-

dent. Petitioner further advised respondent that it would not tow the barge or cause it to be moved unless it was relieved and released from all liability incident thereto and was indemnified for all damages which might arise out of the move or towage, including claims urged by third parties. Respondent agreed to these conditions. That portion of said agreement was evidenced by two letters, one dated December 19 and the other dated December 23, 1957, and was approved by respondent through Russell V. Tidwell and others, all duly authorized to give approval for account of respondent. It was further understood and agreed therein that full insurance for protection against all risks, including the risk of damage to any bridge or fixed structure, was to be procured by respondent at its own expense and that such insurance would enure to the benefit of petitioner. Petitioner attaches copies of the said [fol. 30] letters hereto as Exhibits A and B, and makes them part hereof as if fully copied herein.

6.

Under and pursuant to the agreement so made with respondent, petitioner furnished the Tugs Orleans, Toltec and Ouachita for the movement. Said tugs were described to respondent, and respondent, through its authorized representatives, agreed that the tugs were satisfactory in all respects to perform the contemplated work. At the same conference between the parties, it was agreed that a thirty foot length would be removed from each leg so as to make the barge more maneuverable during its movement, although petitioner asked that sixty feet of each leg be removed.

7.

On or about December 28, 1957, pursuant to the said agreement, the three tugs arrived at the LeTourneau Plant at Vicksburg. Prior to making up the tow, a towing bar or knee was installed by R. G. LeTourneau Company or Dixilyn Drilling Corporation across the keyway at the stern of the barge. In the presence of representatives of Dixilyn Drilling Corporation and with their approval, the tug Toltec,

the tug Ouachita and the tug Orleans made up to the face of the bar. The makeup of the tow and all arrangements for the movement were approved by representatives of Dixilyn Drilling Corporation. Early in the morning of December 26, the tugs commenced pushing the barge down-[fol. 31] stream to a point above Natchez, where the legs of the barge were lowered and the flotilla tied up for the night. On the following morning, with the United States Engineers' pilot boat Orleans sailing ahead of the flotilla and advising as to water depths, the flotilla proceeded downstream to a point just above the Natchez-Vidalia Bridge. The tugs thereupon so maneuvered the barge as to face it upstream, with the stern of the tugs faced downstream in order to develop the maximum power to hold the barge up in the current. At an agreed signal, the agents, servants, employees and representatives of respondent started to let down the legs of the barge so as to permit the flotilla to pass under the Bridge. Prior to executing this maneuver, the clearance between the surface of the water and the lowest point of the Bridge had been ascertained, and the depths of the water in the approaches to the Bridge had likewise been ascertained. Petitioner shows that it accordingly used all due precaution and expert seamanship in preparing to pass under the Bridge.

8.

No one on board the barge other than the agents, servants, employees and representatives of respondent was charged with the duty of raising and lowering her legs. The only person on board the barge in the general employ of petitioner was Captain Brechtel, the master of petitioner's tug Orleans, who, under the contract with respondent, was the borrowed servant or representative of [fol. 32] respondent. However, he had nothing to do with the raising or lowering of the legs, whether as to the mechanics thereof or as to the timing of their movements.

9.

Through the negligence, want of care and inattentiveness to duty on the part of respondent's agents, servants, em-

ployees and representatives charged with the timing and the mechanics of raising and lowering the legs of the barge, instead of permitting all legs to be let down so as to clear the under side of the Bridge, they permitted one leg to remain in a position where its top struck the under side of the Bridge and caused the damages complained of herein. Petitioner is informed and believes and so alleges that the reason the leg failed to clear, among others, was that the depth of said leg was misread or incorrectly reported to the room where it was controlled. At the last moment before the leg was passing under the Bridge, the fact that the draft reading was erroneous was discovered, but at that time it was too late to stop or do anything to prevent the collision.

10.

Nothing which petitioner or any of its agents, servants or employees did or could have done in any way caused or contributed to the collision which, on the contrary, was caused solely and only by the fault, neglect and errors of omission and commision of the master and members of the [fol. 33] crew of the barge Julie Ann, and other agents, servants, employees and representatives of respondent in failing properly and promptly to control the legs so as to cause them to be let down in time to permit the rig to clear the under side of the Bridge.

11.

Petitioner shows that in the event that it is cast for any damages in the premises, it is entitled as a matter of law and by virtue of its contract to be indemnified and reimbursed by respondent for such damages; and petitioner further shows that, by virtue of the breach of the contract to indemnify it and procure insurance for its account, petitioner has been required to retain attorneys and will be required to pay their fees and the costs of defending this action, petitioner having heretofore called upon respondent to take over the defense of the claim and that call having been denied. Petitioner avers on information and belief

that the reasonable attorney's fees and costs incident to the defense of this claim will amount to $15,000, for which sum respondent is liable to petitioner.

12.

All and singular the premises of this 56th Rule Petition are true and correct and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, Crescent Towing & Salvage Co. Inc., petitioner, prays that process according to law and the course [fol. 34] and practice of this Honorable Court issue herein against Dixilyn Drilling Corporation, citing it to appear and answer hereto under oath; and that, after due proceedings had and legal delays, there be a decree herein in favor of petitioner and against respondent, Dixilyn Drilling Corporation, decreeing respondent liable over to petitioner for any amount for which petitioner may be cast in any decree entered herein, and for the further amount of $15,000 or such other amount as this Honorable Court may decree petitioner entitled to for its costs and attorney's fees incurred in defending this action.

And for such other and further relief as this Court is competent to give and as may be meet and proper in the premises.

Brunini, Everett, Grantham & Quin, By Billy H. Quin, First National Bank Building, Vicksburg, Mississippi;

Lemle & Kelleher, By Charles Kohlmeyer, Jr., 1836 National Bank of Commerce Bldg., New Orleans, Louisiana;

Proctors for Crescent Towing & Salvage Co. Inc., Petitioner.

Duly sworn to by Billy H. Quin, jurat omitted in printing.

[fol. 36]

EXHIBIT "A" TO PETITION

CRESCENT TOWING & SALVAGE CO., INC.
General Towing — Salvage Operations
625 Hibernia Bank Building
New Orleans 12, La.

Phone
Day or Night
FOrest 6-1521

Cable Address
"CRESTOWSAL"

OPERATING TUGS:
Humrick — Lillian
Port Allen — Port Hudson
William S. Smith
Sandra — Ocean Prince
Orleans

December 19, 1957

Dixilyn Drilling Corp.
Saratoga Building
New Orleans, Louisiana.

Attention: Mr. H. Brighan
Executive Vice President

Subj: "JULIE ANN" From Vicksburg
December 26th, 1957

Gentlemen:

We wish to confirm our recent conversation including Mr. M. O. Boring, Jr. and Mr. Mike Smith, in which we discussed the towing of the "JULIE ANN" from Vicksburg to our Fleet Landing in the New Orleans harbor.

We understand that the "JULIE ANN" will be ready to leave Vicksburg the morning of December 26th and we expect to be in Vicksburg ready to move her at that time; we contemplate using two river pushboats (towboats) of substantial horsepower and one tug boat. For the trip from New Orleans to her offshore location, seagoing tugboats will be used.

[fol. 37] This tow will be performed by Crescent subject to towage release clause, copy of which is attached and is

part of our agreement with you; it being mutually understood and agreed that in consideration of including this clause lower rates prevail. It is also necessary that we (Crescent Towing & Salvage Co., Inc.) be included in the "JULIE ANN" hull and P & I Insurance coverage and we will appreciate receiving a letter or telegram from your underwriters or brokers to this effect as soon as possible.

We will continue to keep in touch with your office and know that you will advise us if there is any change in the anticipated readiness of the rig at Vicksburg. We appreciate very much your calling upon us to tow the "JULIE ANN".

Very truly yours,

CRESCENT TOWING & SALVAGE CO., INC.

BY /s/ WARREN C. APGAR
VICE PRESIDENT.

WCA:m

Encl. (1)

cc—Mr. Pic
Rate files

TOWER'S RELEASE CLAUSE
(ATTACHED TO EXHIBIT "A")

All towage will be performed solely at the risk of the craft towed and its cargo, including the risk of negligence of the master, pilot and crew of the towing craft and our employees, agents and representatives, all of whom in [fol. 38] respect to the towage shall become and be the servants of the craft towed and its owners and operators; provided that nothing herein contained shall be construed as making the craft towed, its owners or operators, liable or responsible for loss of or damage to the towing craft or property owned by third parties or for loss of life or personal injury for which the craft towed, its owners or operators, would not otherwise be liable or responsible.

Neither we nor the towing craft nor its owners or operators shall be liable, and the craft towed and its owners and operators shall hold us and the towing craft and its owners and operators harmless from any liability, for any loss of or damage to the craft towed and its cargo from any cause whatsoever, including loss or damage caused by negligence of the master, pilot and crew of the towing craft and our employees, agents and representative. We reserve the right to tow all vessels singly or with other craft and to change craft towed from one to another tow as frequently as we may find it convenient to do so. Release of craft to be towed to any vessel owned or used by us for towage shall be conclusive evidence of the acceptance of these conditions.

[fol. 39]

EXHIBIT "B" TO PETITION

CRESCENT TOWING & SALVAGE CO., INC.
General Towing — Salvage Operations
625 Hibernia Bank Building
New Orleans 12, La.

Phone
Day or Night
FOrest 6-1521

Cable Address
"CRESTOWSAL"

OPERATING TUGS:
Humrick — Lillian
Port Allen — Port Hudson
William S. Smith
Sandra — Ocean Prince
Orleans

December 23, 1957

Dixilyn Drilling Corporation
Saratoga Building
New Orleans, Louisiana.

Gentlemen:

With further reference to our undertaking to tow your drilling barge JULIE ANN from Vicksburg to our Fleet Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following addi-

tional clause shall be included in the contract as part of the consideration for our undertaking the towage:

It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four [fol. 40] million dollars as to third party claims.

If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.

Very truly yours,

CRESCENT TOWING & SALVAGE CO., INC.

BY /S/ WARREN C. APGAR
VICE PRESIDENT.

WCA:m

APPROVED:

Dixilyn Drilling Corporation

BY: /S/ RUSSELL V. TIDWELL

IN THE UNITED STATES DISTRICT COURT

ANSWER OF DIXILYN DRILLING CORPORATION, AS RESPONDENT, TO PETITION OF CRESCENT TOWING & SALVAGE CO., INC.—Filed April 13, 1959

Now Comes Dixilyn Drilling Corporation, one of the libelees and respondents in the above styled and numbered action, by its attorneys, and for answer to the petition exhibited against it herein by Crescent Towing & Salvage Co., Inc. would show unto the Court the following:

1. Respondent admits the allegations of paragraph 1 of said petition.

2. Respondent admits the allegations of paragraph 2 of said petition.

{fol. 41} 3. Respondent admits the allegations of paragraph 3 of said petition.

4. Said respondent admits that in December, 1957, it entered into an agreement with Crescent Towing & Salvage Co., Inc. whereby said company undertook to transport respondent's drilling barge, the Julie Ann from the plant of R. G. LeTourneau, Inc. at Vicksburg, Mississippi, to New Orleans, Louisiana, for a fixed and stated consideration, but denies that same was based upon any alleged release and indemnification clauses or insuring agreements. Said respondent admits that the description of the drilling barge, the Julie Ann, as contained in paragraph 4 of the petition is substantially correct, but denies that respondent's crew aboard the Julie Ann were at all times in the employ and acting solely and on behalf of respondent, and would show unto the Court that respondent's crew raised or lowered the legs of the Julie Ann solely and entirely on instructions of the agents, servants, and employees of Crescent Towing & Salvage Company, Inc. who had complete supervision over the tugs operated by Crescent Towing & Salvage Co., Inc. and the raising and lowering of the legs of the Julie Ann.

5. Said respondent admits that Crescent Towing & Salvage Co., Inc. recognized that the movement of the Julie

Ann down the river presented unusual problems and was extremely hazardous, but said respondent denies that Crescent Towing & Salvage Co., Inc. agreed to undertake the [fol. 42] move only on condition that it would furnish the motive power and on condition that its master, agents, servants and employees were to become and be, for the purposes of the towage, the agents, servants, employees and representatives of said respondent. Said respondent denies that Crescent Towing & Salvage Co., Inc. advised it that it would not tow the barge or cause it to be towed unless it was relieved and released from all liability incident thereto and was indemnified for all damages which might arise out of the move or towage, including claims urged by third parties. Said respondent denies that it agreed to said conditions, and would show unto the Court that if any such agreement had been made, which is denied, same would constitute an agreement attempting to relieve Crescent Towing & Salvage Co., Inc. of the responsibility for its own negligence, and that any such agreement would be contrary to public policy, void and unenforceable. Said respondent admits that it received the letter dated December 19, 1957, Exhibit "A" to the petition, and the letter dated December 23, 1957, Exhibit "B" to the petition, but denies that the said Russell V. Tidwell had any authority under the law to enter into the type of agreement as construed and alleged by petitioner in paragraph 5 of the petition. Said respondent denies that it was further understood and agreed that full insurance for protection against all risks, including the risk of damage to any bridge or fixed structure was to be procured by respondent at its own expense [fol. 43] and that such insurance would enure to the benefit of petitioner. Said respondent would further show that if any such agreement had been made, which is denied, same would have constituted an attempt on the part of petitioner to be relieved from the effect of its own negligence and that any such agreement would be contrary to public policy, void and unenforceable.

6. Said respondent admits that petitioner furnished the tugs, Orleans, Toltec and Ouachita for the movement, but denies that same were furnished pursuant to the alleged

agreement as stated and construed by petitioner in paragraph 5 of the petition. Respondent would show that it relied entirely on petitioner in its selection of tugs which it believed to be adequate for the movement of the Julie Ann down the Mississippi River, and denies that respondent, through its authorized representatives, agreed that the tugs were satisfactory in all respects to perform the contemplated work. Respondent relied entirely on the judgment of petitioner with respect to petitioner's use of said tugs.

7. Said respondent admits that on or about December 28, 1957, said three tugs arrived at the LeTorneau Plant for the purpose of making up the tow. Respondent denies that its representatives either approved or disapproved the use of said three tugs by petitioner but left the question of the adequacy of said tugs entirely to the discretion of petitioner, and that the use of said three tugs was the sole [fol. 44] decision of petitioner. Respondent denies that the makeup of the tow and all arrangements for the movement were approved by representatives of respondent, and would show that the makeup of the tow and all arrangements for the movement were solely the result of decisions made by petitioner. Respondent admits that petitioner's three tugs were attempting to control the movements of the Julie Ann at a time when it was a short distance upstream from the Natchez-Vidalia Bridge. Respondent admits that the agents, servants, employees and representatives of petitioner made the decision as to when the legs of the barge were to be lowered so as to permit the flotilla to pass under the bridge, and denies that the agents, servants, employees and representatives of respondent, Dixilyn Drilling Corporation, had anything to do with the movement of the legs other than to raise or lower same as directed by the agents, servants and employees of the petitioner, Crescent Towing & Salvage Co., Inc. Respondent denies that its agents, servants or employees were furnished any information with respect to the clearance between the surface of the water and the lowest point of the bridge or the depths of the water in the approaches to the bridge. Respondent denies that petitioner used all due precaution and expert seamanship in

prepafing to pass under the bridge, and would show that petitioner did not have and maintain sufficient tugs and equipment to control the movement of the Julie Ann and [fol. 45] did not have and maintain sufficient tugs and equipment to stop the movement of the Julie Ann when it became apparent that same could not pass under the bridge without one of its vertical legs colliding with said bridge. Respondent would further show that petitioner, at no time prior to the collision, gave respondent notice of the fact that it had not furnished sufficient tugs and equipment to control the Julie Ann and wholly failed to order the legs of the Julie Ann lowered in sufficient time for same to pass under the bridge without striking the bridge. Respondent would further show that the insufficiency of the tugs and equipment furnished by petitioner in attempting to move the Julie Ann under the Natchez-Vidalia Bridge was conceded by petitioner in that it used a fourth tug in addition to the other three, in controlling the movement of the Julie Ann when it subsequently passed under the bridge across the Mississippi River at Baton Rouge, Louisiana. Petitioner was further guilty of negligence in failing to properly test the tugs and equipment required to control the movements of the Julie Ann before beginning said moving operation. Respondent would show that said negligence on the part of petitioner was the sole proximate cause of the resulting collision between one leg of the Julie Ann and said bridge.

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8. Respondent denies that no one on board the Julie Ann other than the agents, servants, employees and representatives of respondent was charged with the duty of raising [fol. 46] and lowering her legs, and respondent would show that the raising and lowering of the legs of the Julie Ann were controlled exclusively by the agents, servants, employees and representatives of the petitioner. Respondent denies that the only person on board the Julie Ann in the general employ of petitioner was Captain Brechtel, the master of petitioner's tug Orleans, and denies that said Captain Brechtel, under the contract with respondent, was the borrowed servant or representative of respondent. Respondent denies that Captain Brechtel had nothing to do

with the raising or lowering of the legs, and respondent would show that he and other representatives of the petitioner exercised exclusive control over the decisions as to when the legs would be raised or lowered.

9. Respondent denies that through negligence, want of care and inattentiveness to duty on the part of respondent's agents, servants, employees and representatives they permitted one leg to remain in a position where its top struck the underside of said bridge, and respondent denies that its agents, servants and employees and representatives were charged with the timing and mechanics of raising and lowering the legs of the Julie Ann and would show that they followed the instructions of the agents, servants, employees and representatives of the petitioner in raising or lowering said legs. Respondent denies that the reason the leg failed to clear was that the depth of said leg was mis-read or [fol. 47] incorrectly reported to the room where it was controlled, and respondent would show that the reason the leg failed to clear was the delay on the part of petitioner's agents, servants, employees and representatives in ordering the legs lowered and the inability of petitioner's tugs to control the movement of the Julie Ann in order for the legs to be after petitioner's decision to lower same. Respondent denies that at the last moment before the leg was passing under the bridge the alleged fact that the draft reading was erroneous was discovered and denies that at that time it was too late to stop or do anything to prevent the collision.

10. Respondent denies that nothing which petitioner, or any of its agents, servants or employees did or could have done in any way caused or contributed to the collision, and would show that the negligence of the agents, servants and employees of petitioner, as hereinabove set out, was the sole proximate cause of said collision. Respondent denies that said collision was caused solely and only by the fault, neglect and errors of omission and commission of the master and members of the crew of the Julie Ann and other agents, employees and representatives of respondent in failing properly and promptly to control the legs so as to cause them to be let down in time to permit the rig to clear the underside of the bridge.

11. Respondent denies that in the event petitioner is assessed with damages in this action, it is entitled as a [fol. 48] matter of law and by virtue of its contract to be indemnified and reimbursed by respondent for such damages. Respondent denies that it has breached its contract with petitioner and would show that the alleged contract to indemnify petitioner and procure insurance for its account is not susceptible to the interpretation placed on it by petitioner, and if susceptible to such interpretation, such contract is contrary to public policy, void and unenforceable as an attempt on the part of petitioner to avoid the results of its negligence. Respondent denies that it is in any way liable to petitioner in this action, and denies that it is liable to petitioner in an amount to cover petitioner's attorneys' fees in the amount of $15,000.00 or any other amount.

12. Respondent denies that the allegations of the petition filed under Rule 56 are true and correct and denies that petitioner is entitled to recover any amount of or from the respondent in this action, and that the petition should be dismissed at the cost of petitioner with a reasonable allowance to respondent and against petitioner for respondent's expense and attorneys' fees in defending same.

Watkins & Eager, 800 Plaza Building; Jackson, Mississippi, By Thos. H. Watkins, Attorneys for Dixilyn Drilling Corporation.

[fol. 49] *Duly sworn to by Thos. H. Watkins, jurat omitted in printing.*

[fol. 50]

IN THE UNITED STATES DISTRICT COURT

ANSWER OF MISSISSIPPI STATE HIGHWAY COMMISSION, CITY OF NATCHEZ, MISSISSIPPI AND DEPARTMENT OF HIGHWAYS OF THE STATE OF LOUISIANA TO PETITION OF CRESCENT TOWING & SALVAGE CO., INC.—Filed April 22, 1959

Now come Mississippi State Highway Commission, City of Natchez, Mississippi and Department of Highways of the State of Louisiana, libelants in the above styled and numbered action, by their attorneys, and for answer to the petition of Crescent Towing & Salvage Co., Inc. state unto the Court as follows:

1. Libelants admit the allegations of paragraph 1 of said petition.

2. Libelants admit the allegations of paragraph 2 of said petition.

3. Libelants admit the allegations of paragraph 3 of said petition.

4. Libelants admit all the allegations of paragraph 4 of said petition that are consistent with the allegations of the original libel of these libelants, and as to all other allegations contained in said paragraph 4 of the petition, the libelants are without sufficient information or knowledge to answer such, but for the purpose of requiring strict proof on the part of the defendant and third party plaintiff, Crescent Towing & Salvage Company, Inc., deny the same.

5. Libelants are without sufficient information and knowledge to truthfully answer the allegations of paragraph [fol. 51] 5 of the petition, but for the purpose of requiring strict proof deny the same.

6. As to paragraph 6 of the petition, the libelants herein are without sufficient knowledge or information to truthfully answer the allegations thereof, and for the purpose of requiring strict proof the same are denied.

7. All allegations of paragraph 7 of the petition that are consistent with the allegations of the libel are admitted,

but all allegations of paragraph 7 of the petition stating facts contrary to the allegations of the libel are denied; as to all other allegations contained in paragraph 7 of the petition the libelants are without sufficient information or knowledge to truthfully answer the same, but for the purpose of requiring strict proof thereof the same are denied.

8. The allegations of paragraph 8 of the petition are denied.

9. The allegations of paragraph 9 of the petition are admitted, but libelants show that the agents, servants, employees and representatives of the defendant and third party plaintiff were also negligent in the operation of its tug boats and in the towing and controlling of the drilling barge, Julie Ann.

10. The allegations of paragraph 10 of the petition are denied except the allegations as to the failure to lower the legs of the barge, Julie Ann, so as to cause them to be [fol. 52] let down in time to permit the rig to clear the underside of the bridge, which allegation is admitted.

11. Libelants show that paragraph 11 of the petition expresses a conclusion of law and fact and that it requires no answer on the part of the libelants herein.

12. Libelants deny that all and singular the premises of 56th Rule Petition are true and correct but admit that the same are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Libelants do not deem it necessary to answer any other allegation contained in paragraph 12 of the aforesaid petition.

13. Further answering the petition and any affirmative defense heretofore asserted by defendants, the libelants hereby adopt, by special reference, all and singular the premises and allegations contained in the libel.

Mississippi State Highway Commission, By: Attorney General of the State of Mississippi, Matthew Harper, Assistant Attorney General, of Counsel, Jackson, Mississippi;

City of Natchez, Mississippi, By: C. L. Collins, Attorney, 209 Fry Building, Natchez, Mississippi;

Department of Highways of the State of Louisiana, [fol. 53] By: W. Crosby Pegus, Jr., D. Ross Banister, Philip K. Jones, and George W. Lester, of Counsel, By: C. L. Collins, of Counsel.

Duly sworn to by C. L. Collins, jurat omitted in printing.

[fol. 54]

IN THE UNITED STATES DISTRICT COURT

ORDER APPROVING STIPULATION—November 19, 1959

This day this action came on for hearing on the motion of Libelants for an order of this Court adopting, approving, ratifying and confirming a wri n agreement and stipulation made and signed by the Attorneys for all parties herein, and the Court having considered the same is of the opinion that said motion should be sustained.

It Is Therefore Ordered, Adjudged and Decreed that the written stipulation setting forth admissions and agreements of Attorneys for all parties, hereto attached to this order, marked Exhibit "A" and made a part hereof for all purposes, be, and the same is, hereby adopted, approved, ratified and confirmed by this Court.

Ordered, Adjudged and Decreed this 19th day of November, 1959.

S. C. Mize, U. S. District Judge.

Filed and entered OB 1959, Page 197

[fol. 55]

EXHIBIT A TO ORDER

STIPULATION SETTING FORTH ADMISSIONS OR AGREEMENTS OF ATTORNEYS FOR ALL PARTIES—Filed November 19, 1959

At 1:30 o'clock P. M., June 11, 1959 in the Federal Courthouse in Biloxi, Mississippi, Honorable Judge Sidney Mize held a pre-trial conference in the above styled and numbered cause and there were present at said hearing Tom Watkins of the firm of Watkins & Eager, Jackson, Mississippi, and Charles Kohlmeyer of the firm of Lemle & Kelleher of New Orleans, Louisana, attorneys for libelees, and C. L. Collins of Natchez, Mississippi, attorney for libelants.

This hearing resulted in an agreement by all of the aforesaid attorneys that libelants had suffered damages to the Natchez-Vidalia bridge, as described in the Complaint in this cause, in the total sum of Forty One Thousand, Three Hundred Sixty Three and 24/100 ($41,363.24) Dollars, and have paid said sum in the repair thereof, and said libelants are entitled to a judgment for the aforesaid amount, together with interest and costs, against such party or parties as the Courts may finally determine to be liable therefor.

It is further stipulated and agreed that the Libelees could not agree upon the question of their respective liability or liabilities, nor has either admitted any liability whatsoever for the damages hereinabove described; that neither of the libelees have admitted any negligence on their part for the cause of the aforesaid damages and, hence, it is [fol. 56] necessary to litigate, as between themselves, the question or questions of their respective negligence or liability to a conclusion unless at some later date they may resolve their differences by agreement. Accordingly, nothing herein contained shall be deemed to affect the Third Party libel or complaint of Crescent Towing & Salvage Company, Inc. or the matters presented by the pleadings on this phase of this case.

It is further stipulated and agreed that the libelants shall not be required to make any further proof as to liability or

damage in this cause, but the libelees, as between themselves, may litigate to a final conclusion all questions of negligence, liability, contribution, indemnity and ultimate responsibility on the part of each or both of the libelees.

It is further stipulated and agreed that, notwithstanding anything contained herein to the contrary, libelants may, in their discretion, appear at all hearings hereon and offer such proof and make such objections as they may deem proper and necessary, and they may likewise cross-examine any witness on behalf of either of the libelees and, in their option, prosecute this cause to a final conclusion.

It is further stipulated and agreed that the Court may render judgment upon the pleadings against either or both of the libelees and assess damages in such proportion or proportions as the Court may find and determine their [fol. 57] liability or liabilities to be thereunder after a hearing on the case to the same extent as if libelants had proved the claim herein presented.

Stipulated and Agreed this the 11th day of June, 1959.

Watkins & Eager, Attorneys for Dixilyn Drilling Corporation, Libelee, By Tom Watkins, of Counsel;

Brunini, Everett, Grantham & Quin;
Lemle & Kelleher, Attorneys for Crescent Towing & Salvage Company, Inc., Libelee, By Charles Kohlmeyer, Jr., of Counsel.

George W. Lester, Attorney for Department of Highways of the State of Louisiana, Libelant;

Matthew Harper, Assistant Attorney General, Attorney for Mississippi State Highway Commission, Libelant;

C. L. Collins, Attorney for City of Natchez, Mississippi, Libelant, By C. L. Collins, of Counsel.

[fol. 58]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. 871 in Admiralty

MISSISSIPPI STATE HIGHWAY COMMISSION,
CITY OF NATCHEZ, MISSISSIPPI,

—and—

DEPARTMENT OF HIGHWAYS OF THE STATE OF LOUISIANA,
Libelants,

vs.

DIXILYN DRILLING CORPORATION

—and—

CRESCENT TOWING & SALVAGE CO., INC.,
Libelees and Respondents.

Transcript of Evidence

APPEARANCES:

Honorable C. L. Collins, 209 Fry Building, Natchez, Mississippi, For Libelants.

Honorable Thomas H. Watkins of the firm of Watkins & Eager, Jackson, Mississippi; and

Honorable E. D. Vickery of the firm of Royston, Rayzor & Cook, Houston, Texas;

Honorable Charles Kohlmeyer, Jr. of the firm of Lemle & Kelleher, New Orleans, La.;

Honorable William G. Beanland and

Honorable Billy H. Quin of the firm of Brunini, Everett, Grantham & Quin, Vicksburg, Mississippi, For Libelees and Respondents.

Be It Remembered that on, to-wit, Monday, the 28th day of March, 1960, the above-entitled cause came on for hearing before the Honorable S. C. Mize, United States Judge for the Southern District of Mississippi, at Vicksburg, Mississippi, in the Western Division, and the following testimony and proceedings were had:

* * * * * * * * *

[fol. 116] Mr. Kohlmeyer: I think there is in the courtroom Mr. Brigham, the executive vice-president of Dixilyn, adverse to Crescent, and with the Court's permission we'd like to call him under cross examination.

Harry Brigham, called as an adverse witness and having been duly sworn, testified as follows:

Cross examination.

By Mr. Kohlmeyer:

Q. What is your occupation, Mr. Brigham?

A. Executive Vice-President of Dixilyn Drilling Corporation.

Q. Where is your office?

A. 1320 Saratoga Building, New Orleans 12, Louisiana.

Q. In what state is Dixilyn Drilling Corporation incorporated?

A. Delaware.

Q. Are you the manager of the New Orleans office?

A. That is correct.

Q. During the course of the completion of your rig Julie Ann just prior to her movement downriver, did you have occasion to negotiate for the movement of the rig from LeTourneau's plant to New Orleans?

A. Yes. The reason I'm hesitant in saying yes is that there were some casual discussions, and the main negotiation was held between Mr. R. V. Tidwell and the Crescent [fol. 117] representative.

Q. Where?

A. In our New Orleans office.

Q. Were you present?

A. No, sir, I was not.

Q. Were you present at any of the meetings with Crescent's representatives?

A. There again I have a faint recollection, as I said, of casual discussions concerning or relative to Crescent's ability to furnish the necessary equipment to make the tow downriver, and at that time, due to my absence or the pending absence of being out of New Orleans, suggested and requested my assistant, Mr. Tidwell, continue negotiations with Crescent Towing.

Q. Am I right then in stating that you were present at the first meeting but not present at the second meeting? Is that correct?

A. There again, to the best of my knowledge, I think that would be so. Let me state again that we talked casually in the Petroleum Club in the hall or lobby, and also we had what I would term a rather loose session in my office. Really, in my opinion, it was a "get acquainted" session, when they were soliciting our business.

Q. Were you present at a meeting where Crescent was represented by Mr. Mike Smith and Mr. Dick Apgar?

[fol. 118] A. Not the meeting that culminated in the final agreement that they make the tow, no, sir.

Q. Was Mr. Boring present at that time?

A. No, sir.

Q. Were you at any meetings in which Mr. Boring participated?

A. Now, not a meeting per se relative to the towing. I recall Mr. Boring in a visit to New Orleans, being in the office at the time, I believe, Mr. Apgar and Mr. Smith were in the office, and to the best of my recollection it was merely a "shake hands and how do you do," that Mr. Boring didn't enter into any of the specific details concerning the tow.

Q. Did you receive any communications from Crescent relative to this movement? When I say "you," I mean Dixilyn in New Orleans.

A. Yes, we received several letters.

Q. Do you have those letters with you?

A. Mr. Vickery—?

Mr. Vickery: I have those letters, and I'm sorry, but I left them in the hotel room.

Mr. Watkins: It is my recollection those are attached to the pleadings and the identity are admitted by us. I think they are a part of the record already.

Mr. Kohlmeyer: I didn't know it, but we wanted to be [fol. 119] sure these letters were the ones Mr. Brigham received.

The Court: There are some copies of letters attached to the pleadings.

Mr. Kohlmeyer: Yes, sir, there are.

Q. The letters to which I referred were two letters, one of which had an enclosure dated respectively December 19, 1957, and December 23, 1958. They are attached as Exhibit A with an attachment and Exhibit B to the 56th Rule Petition which Crescent has filed against Dixilyn and already are included in the record. They are copies of copies, because the originals were mailed to Dixilyn.

The Court: Then, Mr. Watkins, you and Mr. Vickery agree those are correct copies?

Mr. Watkins: We have so admitted in the answer. We have admitted they were received.

Mr. Kohlmeyer: We now offer the letter of December 19th, with attachment, marking same as Crescent Exhibits 4 and 4A; and the letter of December 23rd, marking same as Crescent's 5.

(Same received in evidence as Defendant's Exhibits No. 4, 4A, and 5 for Crescent. Same are not copied here, as they have already been made a part of this record, appearing on pages 36 through 39.)

[fol. 120] Mr. Kohlmeyer continues:

Q. Do you know, Mr. Brigham, whether or not Mr. Tidwell signed for Dixilyn, approved, on the letter of December 23, 1957?

A. Yes, sir.

Q. He did?

A. Yes, sir.

Q. Did you see that letter?

A. Yes, sir, after the signature was put on it.

Q. Did you instruct him to sign it?

A. I instructed him he had the authority to sign it providing it was satisfactory.

Q. Satisfactory to whom?

A. To him in his discussions with others. When I say "others," I am talking about our parties that were sitting in with the original negotiations with Crescent Towing.

Q. Who are the parties?

A. I think you have a letter on file. Mr. Giffin, Mr. Stentz, Mr. Apgar and Mr. Smith and Mr. Charlie Wood.

Q. Mr. Blakely?

A. And Mr. Blakely.

Q. Those were the parties that were at the meeting at your office that you referred to that you attended?

A. That I did not.

Q. You did not?

[fol. 121] A. No, sir.

Q. Excuse me. That meeting, however, you referred to was held at your office during mid-December, 1957, prior to the towage taking place?

A. That is correct.

Q. There is no question about Mr. Tidwell's authority to approve this letter on behalf of Dixilyn, is there?

A. None whatever.

Q. Who was Mr. Stentz?

A. Mr. Stentz, to the best of my knowledge, is the representative of the Southern Marine and Aviation Underwriters.

Q. Those are the underwriters on the big policy on the rig?

A. On the second policy.

Q. On the rig?

A. Correct.

Q. Mr. Giffin, who is he?

A. He represents the same company, I don't know in what capacity.

Q. Mr. Wood?

A. Mr. Wood owned and managed, operated, the Charles D. Wood Marine Surveyors.

Q. Mr. Blakely was—?

A. An employee of Mr. Wood's.

Q. Did Dixilyn employ Mr. Wood and Mr. Blakely?

A. No, sir.

[fol. 122] Q. For whom were they acting?

A. They were acting for— This is a presumption on my part.

Q. If you don't know, of course, you may say so.

A. Well, here again, as I say, it is a presumption, but I stand to be corrected, but Southern Marine and Aviation Underwriters.

Q. Do you know who first contacted them on behalf of Dixilyn?

A. No, sir, I do not know that.

Q. You do not?

A. No, sir.

Q. Did you have any conversations with them relative to the insurance on this rig for its downbound movement?

A. I did not personally.

Q. Did any conversations take place in your presence?

A. No, sir.

Q. Were you officially advised in your capacity as executive vice-president of the company as to any conversations?

A. Yes.

Mr. Vickery: This seems all immaterial and irrelevant. I don't know what he is driving at, but I don't see the relevancy at all with relation to interrogation about insurance.

The Court: I assume it will be connected. If not, it's nil. I will let him answer.

[fol. 123] A. Conversations relative to what?

Q. The insurance, the bringing of the rig downriver from Vicksburg to New Orleans.

A. Yes, I was advised by Mr. Tidwell concerning the requirements of our coverage prior to executing the tow.

Q. Will you clarify that?

Mr. Vickery: At this time I want to object to any parol evidence at all insofar as the relation to any provisions relating to this towage which are reflected by the written agreements or the so-called contracts as reflected by these letters. This is an area of the law where the law strictly construes contracts and requires that they state in plain

and unequivocal terms and they must speak for themselves. I therefore think it improper for the Court to accept any parol evidence at all with respect to any of the negotiations leading up to the formalizations of the agreements as reflected by the letters in writing or in any way to reflect to any extent the intentions of either of the parties because these contracts are strictly construed by the courts, strictly construed by the persons who drew them, Mr. Kohlmeyer's clients, and I think it clear error to permit any interrogating with respect to the meaning, background or any of the nego- [fol. 124] tiations leading up to the culmination of it.

Mr. Kohlmeyer: If we drew them. But suppose we didn't draw them. Suppose drawn by Dixilyn, would they not be strictly construed against them? And I don't know what you are going to hold with reference to whether or not the contracts are ambiguous. If they are ambiguous, parol evidence would be seeking intent of the parties.

The Court: Yes, I will overrule the objection at this time. Of course, I think counsel has stated correctly the rule that a written contract cannot be varied by parol testimony, nor the discussions leading up to it, if it embodies all the terms; but these two letters that have been introduced in evidence along with the exhibits seem to me to be a rather incomplete contract, and it appears to me you have partially an oral contract and partially a written contract; so I will overrule the objection at this time and let the evidence go in. You can renew your objection at the conclusion of all the testimony, and if it should be that it is incompetent, then of course I will exclude it from consideration.

Mr. Watkins: If I may add one further objection. He is at this point asking Mr. Brigham to repeat something that Mr. Tidwell told Mr. Brigham. I submit that is hearsay [fol. 125] evidence of the worst kind. It is apparently an attempt to show negotiations by what an employee of Dixilyn told Mr. Brigham about what had gone on between that employee and Crescent. I submit that is not the proper way to make proof.

Mr. Kohlmeyer: We aren't, of course, trying to do that. What we are trying to do is find out Dixilyn's official position here from her chief executive officer there on the scene. Mr. Brigham was the chief executive.

The Court: I will make the same ruling on that which I did on the other. Here are two officers of the concern having a discussion with reference to a contract, and if it should become material, in order to interpret the contract, to hear oral testimony, it would be competent, I think, for one side to show how the other side interpreted the contract. So I am going to overrule the objection now and let him answer it, with your right to renew; and if it is incompetent, I will exclude it from consideration in reaching a conclusion in the case.

Mr. Kohlmeyer continues:

Q. Mr. Brigham, could you recall for us the result of the conversations between you and Mr. Tidwell, bearing this in mind; that we want only the position of Dixilyn as a [fol. 126] corporation, of which you were the executive vice-president.

A. Relative to the insurance?

Q. Relative to the insurance and to the contract.

A. The discussion I had with Mr. Tidwell relative to the insurance was that it was deemed advisable before the tow was made to secure additional coverage. I believe that the manner in which it was expressed was that it was necessary to have coverage equivalent to the value of the vessel and not of the corporation. Our insurance is handled by Mr. M. O. Boring, Sr., Vice-President of Dixilyn Drilling Corporation, who was contacted and secured the additional insurance. I do not recall in what amounts additional insurance was acquired.

Q. Did Mr. Tidwell report to you that the insurance requirements of the contract had been completed?

Mr. Vickery: I think he is asking this man to interpret the contracts again, and he is asking for a conclusion of law. He is asking him whether or not he knows whether the insurance provisions of the contract were complied with. I don't think there are any insurance provisions in the contract. I think he is asking this witness to invade the Court's province to interpret the meanings of the contract [fol. 127] between the parties.

The Court: As I understand it, the question was whether or not Mr. Tidwell told him that the contract had been completed, so I will overrule the objection, if I understood the question correctly.

Mr. Kohlmeyer: That is correct, exactly.

A. Mr. Tidwell did advise me that, contacting Mr. Boring —that he was then apprised of the fact that our insurance agents, I presume you would call them, the Brantz Company, had us covered in the amount and for the purposes that Mr. Boring had requested.

Q. Will you state, please, if you know what purposes Mr. Boring had requested that insurance for?

A. He had requested the insurance in the amount equivalent to the value of the vessel.

Q. Did he not, Mr. Brigham, also request that the insurance be such as would protect Crescent from any claim which would be urged by virtue of damage to third parties during the course of the towage?

A. No, sir. Our concern was protection of Dixilyn Drilling Corporation. That was the reason, as I said, it was not the value of the company, but up to the value of the vessel.

Q. When—

A. —I was going to say, your letter there states that [fol. 128] Crescent Towing has ample horsepower and ample insurance.

Q. When was the first time you saw the letter from Crescent to Dixilyn dated December 23, 1957? I'll show you a copy so you can refresh your memory from that.

A. Well, gentlemen, I recognize the letter. As to when was the first time I saw it, I can't recall that—this is not the first letter we received, dated December 31, 1957.

Q. I know you don't know the minute, of course, but was it before Mr. Tidwell signed it or after?

A. I saw this letter after it was signed.

Q. Did you see it the same day it was signed? Do you recall?

A. I do not recall. I'm rather certain I didn't. Had I seen it that day, I would have signed it.

Q. Do you know whether or not you saw this letter before the Julie Ann left LeTourneau's plant?

A. I don't know definitely, but I'm quite positive I did.

Mr. Watkins: We have a standing objection to this line of questions?

The Court: Yes, I will give you a standing objection, and it will be overruled under the same ruling I gave you. You don't waive your objection by failing to renew them to questions along this line.

[fol. 129] Q. Do you recall having seen Crescent's letter to you of December 19th after its receipt by you?

A. May I look at the letter?

(Hands to witness.)

A. Your question was do I recall having seen it prior to when?

Q. When did you first see it, would you know?

A. Gentlemen, I wouldn't know. This has been 27 months.

Q. Do you have a time stamp system in your business?

A. No, sir, we do not.

Q. Do you initial letters, date them when you read them?

A. Not date them. Merely to advise the secretary it has passed my desk and is ready for filing.

Mr. Kohlmeyer: I think it might become necessary for us to ask that Mr. Vickery produce tomorrow the originals of those letters so we can substitute them for the copies.

Mr. Watkins: We have no objection.

The Court: All right.

Q. Do you recall whether or not any action was taken by you subsequent to the receipt of this letter, Mr. Brigham?

A. Any action taken by me subsequent to the receipt of this letter?

[fol. 130] Q. Yes, with reference to the insurance or towage or to the contract. —Well, I'll ask you the direct question. Isn't it a fact that after you received that letter you referred that letter to your underwriters?

A. No, sir.

Q. That is not a fact?

A. No, sir, not this letter.

Q. Did you have any conversation with your underwriters subsequent to the receipt of that letter and before receipt of the second letter?

A. No, sir.

Q. Do you know if anyone in your organization did?

A. Not to my knowledge. Let me say again that there is another letter dated December 23rd which was written as a form of contract, but was not signed by anyone in Dixilyn Drilling Corporation.

Q. Then you got two letters dated December 23rd from Crescent? Is that correct?

A. That is correct.

Q. And the first letter you got from Crescent dated December 23rd, did you see it at the time of its receipt?

A. No, sir.

Q. When did you first know that it had been received?

A. There again, because of my travels and the manner in which I was operating, I couldn't tell you whether it was [fol. 131] two days later or an hour later.

Q. Did you then talk to your underwriters about this matter?

A. I did not, personally.

Q. Did Mr. Tidwell report to you that he had talked to them?

A. Yes, he did.

Q. Do you know what action was taken subsequent to his discussion with the underwriters?

A. Well, here again I'm referring to the best of my knowledge, to the report that he made to me, that there was a portion of one paragraph that was objectionable.

Q. To whom?

A. To our underwriters, and would not be satisfactory to enter into, and requested that it be deleted.

Q. Do you know to whom he made that request or if he made that request?

A. On whom he made what request?

Q. To delete that portion of the letter.

A. Mr. Tidwell did not make the request that it be deleted. He was advised by Mr. Gifford or Mr. Stentz—there again I don't know which it is—this is strictly from the best of my recollection—that it should be deleted.

Q. Isn't it a fact you then put Crescent in direct touch with your underwriters and Mr. Stentz discussed the matter with Crescent's officials?

A. Not to my knowledge. The report that was made to [fol. 132] me, that upon having received the advice, Mr. Tidwell talked to Mr. Apgar and told him it would be necessary to delete that portion of the paragraph.

Mr. Kohlmeyer: Do you have that letter?

Mr. Vickery: The two letters of December 23rd? Yes, we have both of them.

Mr. Kohlmeyer: I'll not then introduce our file copy. I'll wait until the other letter is produced and ask that it be marked as Crescent 6 when produced.

Q. Is it your testimony that this clause was stricken at Dixilyn's request or Dixilyn's instruction?

A. That's correct.

Q. Will you state if you know whether those instructions came from the underwriters?

A. There again I presume they were from the representatives of the underwriters.

Q. To whom were they given? Mr. Tidwell?

A. Mr. Tidwell.

Q. Mr. Tidwell carries on all negotiations with underwriters?

A. That's correct. All negotiations carried on from the New Orleans office.

Q. That's what I mean. Where is Mr. Tidwell now?

A. Mr. Tidwell is here in Vicksburg.

[fol. 133] Q. He is still employed by Dixilyn?

A. Yes, sir.

Q. Do you know what sort of insurance Dixilyn carried on the Julie Ann as to the third party liability?

A. No, sir. I have to admit ignorance so far as insurance policies are concerned.

Q. If I were to show you copies of policies that purport to cover liability of Dixilyn to third parties the damage caused by the rig in the period in question, would you be able to identify them as being correct copies of the documents?

A. I certainly would not.

Mr. Watkins: We object to that description of the policies. He is attempting to interpret the policies. If it be a policy of Dixilyn, I think it will speak for itself.

Mr. Kohlmeyer: There was no intention for me to testify.

A. I would not, no, sir.

Mr. Kohlmeyer: Would you stipulate these two policies are the policies?

Mr. Vickery: These are the copies. If they conform with our file copies, there will be no problem to stipulate [fol. 134] them. To save time, I suggest he proceed and interrogate the witness with respect to them and in line with the Court's ruling this afternoon, he can handle this tonight without taking the Court's time to check the policies at this time.

Mr. Kohlmeyer: I offer now as Crescent's Exhibit 7 Employers Casualty Company Comprehensive General Liability Policy, with all endorsements; and as Crescent's 8 a Certificate of Insurance, Number LADA 59289, issued by Swett and Crawford to Dixilyn Drilling, as Assured, with the request that we do not physically present them now, but afford Mr. Vickery an opportunity to check the policies.

The Court: To keep the record straight, let them be marked, and if there is any inaccuracy, then we can strike them.

(Same received in evidence and marked as Defendant's Exhibits Nos. 7 and 8, respectively, for Crescent Towing & Salvage Company. Same are not copied here but, upon order of the Court, are being sent up in original form.)

Mr. Kohlmeyer continues:

Q. I understand you do not know anything about these insurance policies as such?

A. I wouldn't say anything about them, if you're speak [fol. 135] ing of in detail. Yes, that's true. I know very little about them. Generally, I know that we have coverage. Now, as to being able to interpret the policies step by step, I'm afraid I would be rather inadequate.

Q. Do you recall, Mr. Brigham, whether or not there was any discussion in your office at any get-together at which you were present, relative to taking some footage off the legs of the rig while it was coming downriver?

A. No, sir, I wouldn't know of any reason for that discussion.

Q. Was there any portion of the leg taken off?

A. No, sir.

Q. Are you certain of that?

A. I'm certain of that. There was a portion of the leg left off intentionally under the terms of the contract.

Q. I beg pardon? Which contract was that?

A. With LeTourneau.

Q. How much was left off?

A. Thirty feet.

Q. Of each leg?

A. That's right.

Q. Was that a change in the contract with LeTourneau?

A. No, sir. No, that was written in the original specifications. Not only were the legs not entirely extended, but the derrick was not erected.

[fol. 136] Q. That was a long time before this towage contract was made? Before the towage was arranged?

A. Oh, yes. You are talking about, now, the contract between Dixilyn and—

Q. And LeTourneau.

A. Yes.

Q. In other words, it was always contemplated when LeTourneau was constructing the rig that thirty feet of each leg would be left off?

A. That is correct.

Q. I show you here, Mr. Brigham, three sheets of printed specifications purporting to represent the Julie Ann, and I ask if you can identify those three sheets as being the overall specifications for the rig.

A. Yes, sir.

Q. They are true copies? Is that correct?

A. Well, there again there is considerable detail on here, but I would say they are true copies, yes, sir.

Mr. Kohlmeyer: We offer as Crescent's Exhibits 9, 10 and 11 the three sheets of specifications which the witness has just referred to.

The Witness: May I interrupt or add a little to this?

Mr. Kohlmeyer: Certainly.

The Witness: Those are the specifications, designed specifications, and as the rig presently exists; not as it [fol. 137] existed coming down the river when it left Vicksburg.

Q. What differences were there?

Mr. Vickery: I don't see the materiality of all this. If the Court wants to—

Mr. Kohlmeyer: It's background. I think you want to know how big it was and how high and the measurements of the rig.

A. My other point here— It shows the leg 175 feet. When it left Vicksburg, they were not 175 feet in length.

Q. They were 145, weren't they?

A. I believe 143.

Q. Aside from that, that is the way the rig left Vicksburg to move down the river?

A. I would say from all appearances, yes, sir.

The Court: I'll overrule the objection. Let them be marked.

(Same received in evidence and marked as Defendant Exhibits Nos. 9, 10 and 11, respectively, for Crescent Towing and Salvage Company. Same are not copied here but, upon order of the Court, are being sent up in original form.)

[fol. 138] Mr. Kohlmeyer continues:

Q. Who in Dixilyn's organization, Mr. Brigham, first determined to contact Crescent relative to this towage movement?

A. There again so far as I know, we were contacted by Crescent. I'm not stating that as a fact. I say "so far as I know."

Q. Did you contact any other persons to do this towage?

A. Not to my knowledge.

Q. Do you know whether or not there are any others that could do it?

A. Definitely there are others that could do it, I presume. There are lots of them in business.

Mr. Kohlmeyer: I think that is all.

The Court: Any examination at this time?

Mr. Vickery: Not at this time.

The Court: I believe at this point we will take a recess until nine o'clock tomorrow morning.

(Whereupon the hearing was recessed until the following day.)

Tuesday, March 29, 1960, the hearing was resumed:

Mr. Kohlmeyer: Before we start this morning, we have checked the two policies offered yesterday as Crescent's Exhibits 7 and 8, and it is now stipulated and agreed that [fol. 139] the photostats, with the permission of the Court, may be substituted in lieu of the originals, and that these photostats represent true and correct copies of the original policies with the exception of two endorsements on Exhibit Number 8 and four endorsements on Exhibit 7, none of which are material to the issues before us.

The Court: Let them be substituted and marked.

(Whereupon the photostatic copies of Defendant's Exhibits Nos. 7 and 8 were duly marked and substituted for the originals previously received in evidence.)

Mr. Vickery: In order that the Court may have the benefit of all the insurance in effect, we also would like to introduce in evidence Certificate 8074, Underwriters at Lloyd's policy. If the Court is going to take any of the insurance, it ought to have it all.

Mr. Kohlmeyer: Suppose, in order to keep the record straight, I offer this as Crescent's exhibit, with the understanding that a photostat will be substituted.

Mr. Vickery: That will be fine.

(Same received in evidence and marked as Defendant's Exhibit No. 12 for Crescent Towing & Salvage Company. [fol. 140] Same is not copied here but, upon order of the Court, is being sent up in original form.)

Mr. Kohlmeyer: We also now tender to the reporter for marking as Crescent's Exhibit 6 the original letter of

December 23rd, sent by Crescent to Dixilyn, and which was given to us this morning in response to our call of yesterday by Mr. Vickery, it being understood this letter was the first of the letters of December 23rd that were sent by Crescent to Dixilyn.

(Same received in evidence as Defendant's Exhibit No. 6 for Crescent Towing & Salvage Company. Same is copied below.)

CRESCENT'S EXHIBIT NO. 6

DEC 24 1957

CRESCENT TOWING & SALVAGE CO., INC.
General Towing — Salvage Operations
625 Hibernia Bank Building
New Orleans 12, La.

December 23, 1957

OPERATING TUGS:
Humrick — Lillian
Port Allen — Port Hudson
William S. Smith
Sandra — Ocean Prince
Orleans

(Initials RT and HB)

Dixilyn Drilling Corporation
Saratoga Building
New Orleans, Louisiana.

Gentlemen:

With further reference to our undertaking to tow your drilling barge JULIE ANN from Vicksburg to our Fleet [fol. 141] Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following additional clause shall be included in the contract as part of the consideration for our undertaking the towage:

~~You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claims which may arise out of the towage of~~

~~the drilling barge~~. It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims.

If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.

[fol. 142] Very truly yours,

CRESCENT TOWING & SALVAGE CO., INC.

BY /s/ WARREN C. APGAR
Warren C. Apgar
VICE PRESIDENT.

WCA:m

APPROVED:

Dixilyn Drilling Corporation

BY: .....

(NOT SIGNED.
ALL COPIES—Retained.
H.S.B.)

Mr. Kohlmeyer continues:

Mr. Kohlmeyer: I think it is unnecessary to mark any of these other original letters from their files because they are already before you and it has been stipulated, and they were received in due course and were signed by both parties where it shows they were signed on the typewritten copies annexed to the 56th Rule Petition.

The Court: Yes, sir. That won't be necessary to introduce them again. The original letter you offered in evidence, as I understand, is different from the exhibit that was filed?

Mr. Kohlmeyer: That is correct. The first of the two letters of December 23rd which Crescent sent to Dixilyn and which was not the one which was signed. The lined matter was stricken from the one which was signed. Mr. [fol. 143] Vickery has asked us to stipulate, and we do stipulate, that the Crescent Towing and Salvage Company carried hull and P. I. insurance on the tug Orleans in an amount more than sufficient to cover the amount of claim of the Libelants in this case. Is that sufficient? (To counsel.)

Mr. Vickery: Yes, I think so.

Mr. Kohlmeyer: Also, it is stipulated that by hull insurance we mean insurance on the vessel itself and included therein is a collision clause and a tower's liability clause which would take care of claims made by third parties insofar as ships or vessels are concerned, or insofar as a vessel in tow is concerned. By P & I insurance we mean insurance against loss of third parties to fixed or immovable objects such as bridges, wharves, et cetera; so there would be no question, so this insurance would cover a collision with another ship or vessel or a wharf or bridge.

Mr. Vickery: That covered any liability that might arise out of any of these tugs used in this operation, even not owned directly by Crescent.

Mr. Kohlmeyer: I rather doubt that would be so on account of the coverage of the P & I and the hull.

Mr. Vickery: Do you have tower's liability?

Mr. Kohlmeyer. We had tower's liability on the Orleans; not on the non-owned vessels.

Mr. Vickery: Not on the flotilla?

Mr. Kohlmeyer: No, sir.

[fol. 144] WILLIAM S. SMITH, JR., called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Quin:

Q. You are William S. Smith, Jr.?
A. Yes, sir.
Q. You live in New Orleans?
A. Yes, sir.
Q. You are the vice-president of the Crescent Towing & Salvage Company, Incorporated?
A. Yes, sir.
Q. How long have you been the vice-president of that company?
A. Sixteen years.
Q. The company was incorporated in Louisiana in 1942?
A. That is correct.
Q. And you went to work there immediately after you stopped college? Is that correct?
A. Correct.
Q. This company is owned by you and the members of your family?
A. That is correct.
Q. And it is an integrated operation with several other companies involved in the handling cargo and forwarding of cargo in New Orleans?
A. Correct.
[fol. 145] Q. All the companies have the same offices at one place?
A. Yes, sir.
Q. And the same executives? Is that correct?
A. That is correct.
Q. What tugboats did Crescent own and operate in December of 1957?
A. The William S. Smith, Humrick, Ocean Prince, Port Hudson, Port Allen, Sandra, and the Lillian.
Q. What about the Orleans?
A. Yes, the Orleans. Pardon me.
Q. What is the difference between a tug and a river towboat?

A. Generally speaking, a river towboat is a square bow, square stern, square side, flat bottom vessel designed primarily for work on the inland waters where you have rather big calm water.

Q. And a tug?

A. A tug is a model hull vessel, pointed bow, rounded stern, rounded bottom, primarily designed as a hawser tug; that is, to pull on a line, that is very flexible and can hitch up alongside of barges or ships or anything else—that it's more flexible for our operation. We use them also in the tideland where we couldn't use the inland boats outside. These tugs are flexible; just about go any place.

Q. What is Crescent's business insofar as the towing is concerned.

[fol. 146] A. Primarily harbor towing and tideland towing.

Q. Does Crescent work upriver?

A. Well, I'd say—

Q. Upriver from New Orleans, I mean.

A. On occasions. Actually we are in business to make money and if a job presents itself upriver where there is a dollar to be made, we'll go.

Q. But primarily?

A. Generally speaking, we do not engage in upriver towing as such.

Q. How many companies are there in New Orleans involved in harbor towing such as Crescent is, and outside towing like Crescent?

A. Four.

Q. Who are they?

A. George Whiteman, Willie Bisso and Edwin Bisso. Willie Bisso is New Orleans Coal and Towboat Company.

Q. Do you have any competition from Mobile?

A. Mobile Towing and Wrecking Company. That's very much competition.

Q. How about from the Houston area?

A. G & H in the west Gulf give us competition offshore and foreign deep sea work.

Q. Are there any other tugs similar to those owned and operated by Crescent that are owned and operated by third

parties other than those you have mentioned in the imme-
[fol. 147] diate area of New Orleans?

A. There's many tugs down there, but not of the caliber we are talking about that's in the immediate area. Usually speaking, they are smaller vessels.

Q. Are you familiar with upriver towing?

A. Yes, sir.

Q. Are there any upriver towboats available in and about the vicinity of New Orleans and Vicksburg that might be used in the handling of a tow from Vicksburg to New Orleans, such as the Julie Ann?

A. Oh, literally hundreds.

Q. Does Crescent publish a tariff or publish its rates for upriver towing?

A. No.

Q. You are not a certified carrier?

A. That is correct.

Q. And you have no regular run from one place to another?

A. No, sir.

Q. And you don't hold yourselves out to serve anyone who comes along?

Mr. Watkins: Object as leading.

The Court: Yes, it is leading, but I'll overrule the objection and let him answer.

A. What was the question?

[fol. 148] Q. You don't serve anyone who walks in your door and asks you to serve them?

A. No.

Q. Each individual movement is by special contract?

A. That is correct.

Q. Now, Mr. Smith, insofar as the Julie Ann movement from Vicksburg to New Orleans is concerned, will you state, please, the first time that you had any contact with that movement?

A. The first time I had contact with the movement was at a meeting held in the office of Dixilyn in the Saratoga Building.

Q. Who called the meeting?

A. Well, we had made contact on the phone and they

told us that as soon as Mr. Boring was in town they'd like to sit down and talk about this movement.

Mr. Watkins: For the sake of the record, do we understand we are objecting to these alleged negotiations which we think are an attempt to possibly alter the written alleged contract that they have sued on? As I understand the Court's ruling yesterday, you want to hear it, but we are permitted a continuing objection?

The Court: Yes. I overrule your objection and permit you to have a standing objection to it. The objection will [fol. 149] be overruled without your having waived it.

Q. State who was at the meeting.

A. Mr. Boring, Mr. Brigham, Mr. Tidwell, Mr. Woods, Mr. Blakely, Mr. Apgar and myself.

Q. Do you recall the date of that meeting?

A. Early December.

Q. That was before the movement, of course?

A. Definitely.

Q. Will you state who Mr. Blakely and Mr. Woods were?

A. They were surveyors. I've known Charlie Woods for years, and Blakely as well, and they were surveyors for the underwriters, to the best of my knowledge.

Q. Did you know of your own knowledge that they did or did not work for Dixilyn, as such, principally?

A. Generally they did not work for Dixilyn. They were not introduced as Dixilyn.

Q. You knew they were independents who worked in insurance?

A. Right.

Q. Did you have any contact with them about the work prior to the time you saw them in the office about Dixilyn's Julie Ann?

A. No.

Q. Did you know they were going to be at the meeting, when you got there, before you got there?

[fol. 150] A. No.

Q. Were they introduced to you as being there in any special capacity?

A. They were introduced as being with Southern Marine and Aviation.

Q. Do you know who Southern Marine and Aviation were?

A. Yes, sir, we have run into them quite a bit in these building rigs.

Q. Who are they?

A. They are underwriters, handle a big portion of the building industry.

Q. And Mr. Woods and Mr. Blakely were held out by Dixilyn as being representatives of Southern Marine and Aviation?

A. Correct.

Q. What was discussed at that meeting, Mr. Smith?

A. We discussed the movement of the Julie Ann from Vicksburg to New Orleans; went into the actual physical movement. We discussed that and we talked about horsepower and the number of boats that would be involved.

Q. Had Crescent moved any other rigs from LeTourneau to New Orleans prior to this time?

A. Yes, sir, we had moved the Deep Water Number Two and the Barnwell rig—

Q. How many rigs had come out of LeTourneau at this time?

A. I think four. This was the fifth, this Julie Ann.

Q. Was there any discussion about the size of the legs of the rig?

[fol. 151] A. Yes, sir, we talked about the legs or the height of the legs coming under the bridges. We figured it would be better to leave a portion of the legs off, and we recommended sixty feet because of the height of the river at the time, and we thought it would be better for the overall handling of the job to leave sixty feet off and assemble that back when we got here back down to New Orleans.

Q. Who took us that suggestion? I think you said "we recommended." Who recommended?

A. I did.

Q. What was the result of that recommendation?

A. I think Mr. Brigham— In fact, Mr. Brigham told me they had already made arrangements to leave thirty feet of the legs off, and Mr. Woods was confident that that would be enough to effect the movement.

Q. Was any discussion had about the personnel who was to be on the Crescent vessel involved, or vessels, involved in this movement?

A. We were asked if Captain Brechtel would be available to go on this movement, and we assured them we would make him available to come down with the tow.

Q. What was Brechtel's special involvement in this?

A. He was to coordinate the movement of the three vessels in bringing the rig down.

Q. What was his experience involved in towing rigs downriver?

[fol. 152] A. Well, this was to be the third one he had towed down, and he holds a license all the way up to Cairo, St. Louis. He has been on river towing.

Q. He had handled the prior tows Crescent had brought down?

A. That is correct.

Q. Was there any discussion about any other towboats or tug boats to be used?

A. We discussed horsepower, and because we didn't know at that time what boats actually would be in the vicinity and available to make this tow—we just—generally speaking, horsepower, and it was suggested by Mr. Woods the Ouachita would be in Vicksburg, and we said we would have no objection to using it.

Mr. Vickery: I want to object to any conversations or statement made by Mr. Woods in connection with this matter as being hearsay as to Dixilyn Corporation. The man, unfortunately, is dead and unavailable for testimony in the court, and any transactions with him—especially since he was not a representative of Dixilyn but was there as a representative of an independent company not a party of this suit, I think any actions taken by Mr. Woods are not binding on Dixilyn.

The Court: Let me ask: Was Mr. Brigham or any other representative of Dixilyn present when this—

[fol. 153] The Witness: Yes, sir.

The Court: For the time being, I will overrule the objection, giving you the right to renew it. Was he in hearing distance of this alleged conversation?

The Witness: Yes, sir, we were all in Mr. Brigham's office.

The Court: For the time being, I will overrule the objection.

Mr. Quin continues:

Q. Will you proceed? You were telling us about the discussions relative to horsepower.

A. Well, we were talking about the total amount of horsepower we would recommend to effect this movement, and the Ouachita was suggested by Mr. Woods as being in Vicksburg, and we had no objection to using it because she fell into the horsepower range we were talking about. And then we told them we'd get another boat, the Toltec, in that horsepower class, and it so happened we were able to turn the Toltec around and effect the tow to New Orleans.

Q. What was the rated horsepower of the Orleans?

A. 700 horsepower.

Q. And the Ouachita?

A. 1800.

Q. The Toltec?

[fol. 154] A. 3600 or 4000, in that range. She's twin screw.

Q. Were those horsepowers known to the parties in the room when they were being discussed? Were they mentioned, or were the vessels involved known to the parties?

A. The Ouachita was known. The Orleans was known. The other reference was made to horsepower and the Toltec was mentioned as being in the category of horsepower, that class we had booked for.

Q. Is it fair to state you are talking about the total horsepower and not individual vessels?

A. Correct.

Q. And the total horsepower of those three vessels—Strike that. Is it a fair statement then that the negotiations at this point referred to a total horsepower of approximately 6500 or 7000, in that range?

A. That is correct.

Q. And what vessels you used in developing that horsepower was of no—?

A. —That is correct. Just a question of what boat you could turn around in the area around Vicksburg to effect the movement.

Q. Were rates discussed at that time?

A. Very generally and very vaguely. We knew what the Orleans was. We were prepared to furnish the rate on the Orleans on the spot. And the Ouachita had just come up at this meeting, and we hadn't been able to negotiate a rate with them but we gave an indication as to that [fol. 155] much power would cost so much money, the same as the bigger boat. Just indications only.

Q. No rates actually quoted as firm rates for this movement?

A. No, sir.

Q. Were any other matters discussed?

A. Well, we went into a bunch of subjects involving—such as where to tie up when we got down here, making arrangements to berth her and have a party on.

Q. State about the party.

A. Well, the party, the christening party, was held right at Bienville Street wharf.

Q. I'm talking about telling the Court what your conversations were that day relative to the party to be held in New Orleans.

A. Oh. Well, there again very general. In other words, what had to be done was the rig had to be brought down and they were looking for a safe pier to tie it up to complete the rig when they got it down. After the rig was completed, on a given date we would then move it over to a wharf in New Orleans to be furnished at the time, and there was going to be a christening party aboard the rig with the industry generally invited to inspect this new driller.

Q. Who was going to give that party?

A. Dixilyn Drilling. And LeTourneau participated too.

Q. What was your part in the party? What was the conversation with you about it insofar as the party was [fol. 156] concerned?

A. We were going to make arrangements with the Dock Board to have a wharf available for us so they could conduct this party. —Try to get a guarantee out of the Dock

Board so they could have the invitations printed up in time enough to know exactly where to put the rig.

Q. Was there any discussion in that meeting with reference to a release clause or insurance insofar as it would inure to Crescent?

A. We started to get into that, and Mr. Boring told us he would rather not discuss that at that particular meeting. All he wanted to discuss at this meeting was the physical movement of the rig from Vicksburg to New Orleans.

Q. And the conditions of the towage relative to releases were not gone into, as such, at that meeting?

A. That is correct.

Q. And the reason they weren't is because Mr. Boring said he didn't want to discuss that?

A. That is correct.

Q. Did he state why he did not want to discuss it?

A. He said we would have another meeting at another date to get into that phase of it.

Q. Was the insurance on the Dixilyn rig mentioned during that first meeting?

[fol. 157] A. Mentioned? Yes.

Q. In what regard?

A. I think Apgar mentioned something about our standard form of agreement up here that would have to be held, and released from all liability on this thing, and that is when we were told we would have to get into that at a later date.

Q. On your prior movements of—

A. —No, on Deep Water Two.

Q. —Had you had release clauses?

Mr. Vickery: We object to that. What two other parties had to do with moving another rig has no bearing.

The Court: I can't see the relevance. Of course, you are entitled to an answer for the record, but I think I'll sustain the objection.

Q. Don't answer. Now, who was the technical man in that meeting for Dixilyn? I'm trying to find out whether the personnel of Dixilyn at the meeting were technical men or office personnel, if you know.

A. Well, actually that was our first meeting with them, and I wouldn't have any way of knowing, going into that meeting, just who was who, actually. They all discussed this thing as if they had been well acquainted with the [fol. 158] problems in moving these rigs or other rigs.

Q. Who owns the Ouachita? Do you know?

A. No, sir, I don't.

Q. Do you or any member of your family or company have any interest at all in the ownership or operation of the Ouachita?

A. No, sir.

Q. Did you at any time?

A. No, sir.

Q. Who owns the Toltec?

A. I don't know that either. I think she is operated by Jack Neilson, but I don't know who owns her.

Q. Have you or any member of your family or company now or at any time any connection with the ownership or operation of the Toltec?

A. No.

Q. It is completely immaterial to you as to what towboats were to be used in this movement?

A. That is correct.

Q. Was there any discussion in this meeting as to the riding crew, if any, to be put on board the Julie Ann?

A. No, sir, we didn't get into that phase. They were going to have their own people on board. We never put riding people on drilling rigs.

Q. In other words, Dixilyn was to have a riding crew [fol. 159] aboard in its own discretion and not as a part of Crescent's duties? Is that correct?

A. That is correct.

Q. Do your personnel know anything about the operation of a drilling rig insofar as its legs going up and down and its machinery are concerned?

A. No, sir.

Q. Would they be capable of operating the machinery of a drilling rig?

A. No, sir, we have no knowledge of that.

Q. Was there any understanding reached at this meeting as to who would operate the legs on the rig?

A. No, sir.

Q. It was known, of course, that those legs would have to be lowered and raised during the course of the voyage?

A. Definitely.

Q. When you say there was no understanding reached, will you explain that answer, please?

A. We assumed somebody was going to do it, but was understood we wouldn't. I mean, it was never asked of us to perform such a service. All we were going to do was tow it.

Q. Did Mr. Boring or Mr. Brigham or Mr. Tidwell have any discussions at that meeting relative to the amount of horsepower that was necessary to be generated on this movement, if you recall?

[fol. 160] A. Well, they asked us what we thought it would take, and we made the recommendations and they went along with them.

Q. Who is "they"? When you say "they asked us"—Do you recall whether that was Mr. Woods or Mr.—?

A. I think it was Woods. In fact, it was clearly Woods that asked how much horsepower we thought it would take to effect this movement, and we told him with the river at the stage it was and one thing and another, we thought it would take every bit of 6000 or more to effect this movement.

Q. I'm trying to find out if any of the three Dixilyn officers in that meeting had any part in that discussion.

A. They were all present.

Q. I understand, but did they discuss themselves or just listen?

A. I think— No, Charlie Woods asked the question and it was confined— The discussion was more or less confined with Woods and myself as to the horsepower that was to be used.

Q. But within the presence of Dixilyn and in the hearing of the Dixilyn people?

A. Definitely.

Q. And you are certain that there was an agreement that this horsepower was sufficient?

A. Yes, sir.

[fol. 161] Q. And whether Woods said it or Blakely or someone else in the room, it was agreed that the horsepower was sufficient horsepower?

A. Correct.

Mr. Quin: You may question.

The Court: You may cross examine without waiving any of your objections heretofore made.

Cross examination.

By Mr. Vickery:

Q. Mr. Smith, I want to be sure I understand just what your approach to this particular towage problem was. You openly solicited this job, did you not?

A. Yes, sir, we did.

Q. You openly solicited it more than a month in advance of the anticipated movement, did you not?

A. Well, we have form letters we send out periodically to all the people in the oil industry.

Q. I ask if you recognize the signature of your operating manager, Mr. Pic, on this letter.

A. Yes, sir.

Q. In which he openly solicits this movement and in which he represents to Dixilyn Drilling Corporation that you all are experts in the field.

A. Correct.

[fol. 162] Q. And that you are extremely competent to handle this job.

A. Right.

Mr. Vickery: We offer this.

(Same received in evidence and marked as Defendant's Exhibit No. 3 for Dixilyn Drilling Corporation. Same is copied below:)

DIXILYN'S EXHIBIT No. 3

CRESCENT TOWING & SALVAGE CO., INC.
General Towing—Salvage Operations
625 Hibernia Bank Building
New Orleans 12, La.

OPERATING TUGS:
Humrick—Lillian
Port Allen—Port Hudson
William S. Smith
Sandra—Ocean Prince
Orleans

November 18, 1957

Mr. Pickering
Dixilyn Drilling Corp.
P. O. Box 621
Morgan City, Louisiana.

Dear Sir:

We understand you will have in the very near future a drilling rig to be moved from Vicksburg, Mississippi, to a location in the Gulf of Mexico.

We would appreciate your affording us the opportunity to submit a bid on this movement and are listing hereunder our tugs which are available for towage service.

[fol. 163]

GRT	Tugs	Built	H.P.	Length	Beam	Depth
574	"William S. Smith"	1943	1850	144.0′	32.8′	15.8′
418	"Humrick"	1919	1700	142.0′	27.5′	14.6′
395	"Ocean Prince"	1944	1400	116.0′	30.0′	14.8′
194	"Sandra"	1942	1200	93.1′	25.0′	11.6′
199	"Port Allen"	1943	1000	93.1′	25.0′	11.6′
199	"Port Hudson"	1943	1000	93.1′	25.0′	11.6′
146	"Orleans"	1943	700	81.1′	24.0′	9.0′
138	"Lillian"	1940	600	75.9′	23.5′	10.8′

All of the above tugs are carried in class in the American Bureau Register and are fully insured both as to Hull and

P & I, which we believe is a full guarantee of maintenance and efficiency.

Please let us know what horsepower will be required to move your rig and to what location, or any other arrangements which you may desire.

We have in the last two years been operating in the offshore waters in the Gulf of Mexico and have towed and handled every large rig in operation.

With anticipation of a favorable reply, we are

Yours very truly,

CRESCENT TOWING & SALVAGE CO., INC.

By /s/ E. J. PIC, JR.
E. J. Pic, Jr.
Operating Manager

EJP,Jr:m

[fol. 164] Mr. Kohlmeyer: I wanted to say that although we agree that takes us as experts, we don't agree to the characterizations Mr. Vickery puts in the record as a part of the record. Simply, the letter stands for itself, rather than what he says it stands for.

Mr. Vickery: Well, Mr. Smith agreed with me, whether Mr. Kohlmeyer did or not.

Mr. Vickery continues:

Q. You were holding yourselves out to Dixilyn to be expert in the towage, not only in barges and harbor towing, but as an expert in performing this particular towing?

A. Correct.

Q. From your particular experience?

A. Correct.

Q. And you went to them not asking them for the advice as to the amount of horsepower that ought to be used in this tow?

A. We went to them and made suggestions as to the horsepower that should be used, that is correct.

Q. And actually Dixilyn asked you for the amount of

horsepower that you thought ought to be used in connection with this towage?

A. Correct.

Q. They asked you in your capacity as an expert tower, [fol. 165] did they not?

A. Correct.

Q. And you expected them to rely on the recommendations you made with respect to the horsepower?

A. That is correct. We were all in agreement when we left there.

Q. You would have felt a little bit funny, wouldn't you, as an expert tower, if an oil well drilling company had overruled your suggestion with respect to horsepower?

A. Not necessarily.

Q. Did Mr. Tidwell or Mr. Boring or Mr. Bingham ever represent to you that they had any expert knowledge about towing or the horsepower required in connection with this movement?

A. No, sir, can't say they did.

Q. As a matter of fact, if you were perfectly frank about it, you would have to acknowledge that Dixilyn—Mr. Boring and Tidwell and Brigham—were relying entirely on you with respect to the horsepower necessary in order to make the tow?

A. That is correct. We discussed it and came up with that agreement.

Q. Now then, it was contemplated and actually developed, did it not, that you were to arrange for the necessary boats to handle this movement?

A. That is correct.

[fol. 166] Q. Dixilyn didn't have a thing to do with the arranging for the Ouachita or Toltec?

A. No, sir, left that in my hands.

Q. Left that entirely in your hands?

A. Correct.

Q. And left that to you in your capacity as an expert tower to furnish that tow?

A. Yes, and to furnish Captain Brechtel, who they requested.

Q. And you say "they requested." Mr. Woods suggested Captain Brechtel because of his previous experience?

A. Correct.

Q. Did you consider Captain Brechtel to be the most skilled man in your organization to handle this tow?

A. Yes, sir.

Q. Actually, even if Mr. Woods hadn't suggested him, he probably would have been the man you put on the job?

A. Correct.

Q. Now then, you don't have any ownership or operation of the Toltec or the Ouachita?

A. None whatsoever.

Q. —in her general operations.

A. That is correct.

Q. There is no doubt in your mind but what they were under the complete supervision and control of Captain Brechtel in connection with the towage movement?

A. No. They did cooperate a hundred percent.

[fol. 167] Q. And Captain Brechtel had the same authority and control over those two vessels as if they had been two other vessels in your fleet? Isn't that true?

A. He was put on there to coordinate the movement between the three vessels, and therefore they would come under his jurisdiction.

Q. To the same extent as if you had two other boats of Crescent Towing and Salvage?

A. Well, to this extent: that they would go along with him unless they put him in jeopardy, and then of course his authority would never have superseded the master of that particular boat.

Q. Nor the master of another Crescent boat?

A. That's correct.

Q. So he had exactly the same authority over those two vessels that he had over two of Crescent's vessels?

A. Correct.

Q. And it was your operation?

A. Yes, sir.

Q. Dixilyn didn't have anything to do with that?

A. No, sir. They knew we didn't have towboats and would have to secure them from the outside.

Q. They relied on you to see that the towboats you got was that necessary to handle this tow?

A. Fell within horsepower we recommended, that is correct.

Q. Now then, with respect to the legs, Mr. Smith, as I [fol. 168] understand it, it was your recommendation that there were sixty feet of the legs to be taken off? Is that correct?

A. That is correct.

Q. And they indicated to you that they already had thirty feet off?

A. That is correct.

Q. And they didn't think any more was necessary?

A. That is correct. Mr. Woods made a study of everything and he felt that thirty was all that was necessary to be taken off.

Q. Now then, I assume that you agreed that you could perform this towage in reasonable safety with only thirty feet off or you never would have taken on the job.

A. We admitted it could be done, but it would be a little more difficult.

Q. You felt it could be done in reasonable safety?

A. Definitely.

Q. Or you never would have taken on the job?

A. That is correct, absolutely correct.

Q. Of course, it would have been a lot easier to do it if you didn't have any legs on the barge at all.

A. Right.

Q. You felt with 143 feet of legs left on the barge there would be plenty of clearage at the various bridges?

A. Correct.

[fol. 169] Q. So the whole tow could be handled without appreciable difficulty?

A. Correct.

Q. Now then, of course, in your capacity as a tower of barges such as this and your capacity as an expert tower, it is necessary to making the deal for you to know the condition of the river at the time the towage was completed?

A. That is correct.

Q. It was necessary for you to know generally the contours of the river and how much water you had at various points and just what you were going to have to do in connection with the handling of the barge?

A. Correct.

Q. You didn't rely on Dixilyn to furnish you any of that information?

A. No, sir, we relied on the U. S. Engineers.

Q. And you relied on Captain Brechtel to have that knowledge.

A. Correct, and he had it.

Q. It was contemplated, was it not, that except for the lowering of the legs upon instructions from Captain Brechtel, that the navigation of the flotilla would be entirely in Captain Brechtel's hands?

A. Correct. That is correct.

Q. Now then, as I understood your testimony a minute [fol. 170] ago, you say that none of your personnel knew anything about the operation of the legs on the drilling barge Julie Ann? Is that correct?

A. That is correct. I don't think any of them had working knowledge of the operation of the legs of the Julie Ann.

Q. Did Captain Brechtel know anything about the operation of these legs?

A. Not to my knowledge.

Q. He had no idea how long it would be taking to lower from one height to another or anything of that nature?

A. He probably had a general knowledge from the past two experiences he had, but I wouldn't say he knew of the rate of travel or anything else. No, I don't think he would have a knowledge of that; would have no reason to.

Q. That would be of no materiality to him as the pilot of the flotilla?

A. That's correct.

Q. Whether it took fifteen minutes to lower the legs a hundred feet or an hour to lower it a hundred feet would not make any difference to the man in charge of the flotilla?

A. No, sir.

Q. So I assume from what you say that Captain Brechtel not only didn't know anything about it, but in handling [fol. 171] the tow you didn't expect him to learn anything about it?

Mr. Kohlmeyer: I submit the question is improper. He is asking for an opinion on whether someone else knew or

did not know, which obviously this witness isn't competent to answer.

The Court: Overrule the objection if he knows.

A. Well, I'd say this: that Captain Brechtel would round the rig up above the bridge and stop it and give the orders to drop the legs. And when they told him the legs were of sufficient height to clear the bridge, then he would proceed under the bridge. Whether that took five minutes or an hour is of no moment to me or Captain Brechtel. All he wants to do is when he gets the all clear signal just go on through the bridge.

Q. It is contemplated in the tow that it would be handled in such a way it would be stopped completely at a point above the bridge until the desired depth on the legs had been obtained?

A. Correct.

Q. And you intended the horsepower you furnished to supply that power?

A. Correct.

[fol. 172] Q. Considering the current and the stage of the river on that particular day?

A. That is correct.

Q. And that is the basis on which you made your recommendation?

A. Correct.

Q. Then if in fact in the actual process of taking this barge through the bridge it was never stopped completely above the bridge until the legs were lowered to the proper depth, it would indicate that you did not have sufficient horsepower on that tow to control it?

A. Would you restate that question?

Q. Yes, sir. You contemplated, as I understand it, that the tow would be stopped completely above the bridge until the legs were lowered to the proper depth to go under the Natchez Bridge?

A. Correct.

Q. Now then, if we assume that the tugs did not in fact hold the tow up above the bridge until the legs could be gotten to the proper depth, but rather continued on down into the bridge and struck the bridge before the legs

reached the proper depth, it would indicate you had insufficient horsepower on the tow?

A. If the rig never did stop and just kept right on coming?

Q. Yes.

[fol. 173] A. And the legs weren't sufficiently low enough to clear?

Q. Yes.

A. I don't know. You've got me at a disadvantage there.

Q. I'm just asking you to assume those hypothetical facts. What would you think would cause that or what would you think would be causing the tugs not to be able to stop the tow above the bridge before the legs struck the bridge if we assume those facts?

A. Well, assuming those facts they never did stop, I don't know. I can't answer. I mean you are putting me in an awkward position assuming facts. It was always my understanding that the rig was stopped.

Q. I'm not asking you to assume what you hear from your employees to be the facts about this lawsuit. I'm asking you to assume the facts which I have given you.

Mr. Kohlmeyer: May I ask that those facts on which Mr. Vickery is asking this hypothetical question be repeated? I think it becomes important at this stage.

Mr. Vickery: I think I have done it twice, but I'll be glad to accommodate.

Q. Mr. Smith, you do, of course, consider yourself to be an expert in the towing field?

A. Correct.

[fol. 174] Q. And you do consider yourself an expert to determine the horsepower necessary to handle any kind of tow on the river or offshore or otherwise?

A. Correct.

Q. Now then, Mr. Smith, assume this state of facts: Assume with me that up above the Natchez Bridge the tugs and tow were turned around so that they were coming back down the river with the stern of the tugs and the stern of the barge Julie Ann to come underneath the bridge first; that they were made up with the Toltec in the center and with the Ouachita on the left hand side

of the Toltec and the Orleans on the right hand side; and that after turning around to head back downstream approximately a half a mile up from the bridge, the Natchez Bridge, that the legs were started to be lowered on the barge Julie Ann, and that it was a continual process of the barge and tugs moving down from that point on until one of the legs of the Julie Ann actually touched the Natchez Bridge and did some damage to it; and that during this period of time the tugs never did hold the barge Julie Ann up until such time as the legs had reached the proper depth. Then isn't the conclusion inescapable that there was insufficient horsepower on these three tugs to control that tow, as you had contemplated they should, in this movement?

[fol. 175] A. Under those circumstances, I would say yes. If they never did check the momentum of the barge, there probably was something lacking. That is correct.

Q. If they not only didn't check it, but didn't absolutely hold it there while the legs were going down, that is true?

A. That would be true under those circumstances.

Q. And if the engine on one of the three tugs went out completely shortly before the flotilla got to the Natchez River Bridge, certainly, at that time with that engine out, you would have to say without reservation that there was inadequate horsepower to control the flotilla, would you not?

A. That is correct.

Mr. Vickery: I believe that is all.

Redirect examination.

By Mr. Kohlmeyer:

Q. In answer to the hypothetical question Mr. Vickery just asked you, you said, I think, that if that set of facts as existed were true, then you would have to conclude that the flotilla was underpowered? Is that correct?

A. Correct.

Q. Included in those facts, will you state what hypotheses you used insofar as speed and height of the legs were [fol. 176] concerned?

A. Speed and height?

Q. Speed of the flotilla and height of the legs.

A. Well, actually that was the controlling factor in the whole thing. The deeper you got the legs in the water, the more current you got to— One boat could handle the Julie Ann easily if the legs were all the way up. You needed the power when the legs started down. That is why we recommended the power. And the deeper the legs got in the water, the more power it took to hold her.

Q. If the legs had been sufficiently far down, Mr. Smith, it is obvious they would not have hit the bridge, of course?

A. Correct.

Q. If the legs had been reported far enough down and if Captain Wood or Mr. Hughes or those in charge of the Julie Ann had reported that they were sufficiently far down to Captain Brechtel and Captain Brechtel had said, "O.K., we'll go on through the bridge," and if the legs were in fact not as far down as had been reported, would there be any fault on the part of the flotilla?

Mr. Vickery: This is the ultimate conclusion that the Court has to reach in this case, and he is asking this man [fol. 177] to express an opinion upon the ultimate decision of this Court, and I think it calls for a legal conclusion.

The Court: I'll let him answer the question for the record, but I will sustain the objection and exclude it from consideration.

Mr. Kohlmeyer: It's the same question Mr. Vickery asked. He asked a hypothetical question that there was only one answer to.

The Court: You didn't object to it, and I let it go in. I think those are questions for the Court to ultimately determine. Now, of course, the question on cross examination did not call for the ultimate conclusion of the lawsuit, but asks his expert opinion upon one phase of alleged negligence. That seems to be admissible, but I'm very doubtful about that. I'm going to let him answer your question for the record, but I'm going to sustain the objection and exclude it from consideration because I think it calls for his opinion upon the ultimate decision of the Court. It is for the Court to determine whether or not it was negligence. I'll let him answer for the record.

A. I would say this: that if after he rounded that tow up and was holding up slow to the current and dropping down [fol. 178] toward the bridge, if he had the O. K. that the legs were proper depth, there was no reason for him to ever actually stop the tow, and he could have come right on through the bridge.

Q. And of course if the leg was not sufficiently far down, he would have hit the bridge?

A. Correct.

The Court: I believe I will change the ruling. I'll overrule the objection and let it go in, and it will be considered with all the other evidence that may be introduced by the other side.

Q. Now, Mr. Smith, assuming that these legs were down 45 to 55 feet below the surface of the river, and assuming that the river was at a stage where you had a current between four and five and a half miles per hour; assuming he has three towboats or tugs facing upstream with the rig dropping downstream under the bridge; assuming, if you will, that you called for a double hook-up of full power on the tugs, will you state, if you know, what the effect would be of that maneuver on the trim of the rig fore and aft?

A. With those pontoons on the bottom of those legs sticking down 45 to 55 feet below the water surface, you would have a tendency to tip that rig; with that pointed upstream, [fol. 179] you have got a minimum of buoyancy, and with all the drag under the water, you would have a tendency to tip her down by about the head.

Q. In other words, the upstream end of the rig would have a tendency to go down in the water, and the downstream end of the rig would have a tendency to come up in the water? Is that correct?

A. Correct.

Q. That is a normal physical fact?

A. That is correct.

Q. In the course of your operation of the flotilla downriver, particularly at the time when it was passing under a bridge, was it ever contemplated the Crescent personnel would have anything to do with the operation of the legs?

A. No, sir.

Q. Were any Crescent personnel aboard the rig to take readings of the legs?

A. No, sir.

Q. Do you know who was on board as an employee on the payroll of Crescent?

A. Captain Brechtel.

Q. He was the only one?

A. The only one.

Q. Now, in answer to several of Mr. Vickery's questions relative to the recommendations as to horsepower and the [fol. 180] agreement thereon, I think you stated that the three officers of Dixilyn relied on you insofar as your expert knowledge was concerned on moving the rig? Is that correct?

A. Correct.

Q. Will you state, if you know, Mr. Smith, what the qualifications of Mr. Wood and Mr. Blakely were?

Mr. Vickery: Our running objection, in view of the fact that I don't consider them our employees and in any way binding on us.

Mr. Kohlmeyer: This is a lawsuit involving—one of the questions will be the efficacy of this horsepower that was put on this rig. We go to a meeting here at which—

The Court: —I'll overrule the objection for the same reason I did before.

A. Mr. Woods and Mr. Blakely had effected probably the move on all four of the rigs that had come down previous to the Julie Ann.

Q. Do you know who Blakely was?

A. Blakely is an Englishman with a degree in naval architecture or marine engineering from Oxford or one of those big universities over there, and he practiced over here with Freedy and Goldman, Naval Architects in New Or- [fol. 181] leans, and then he went with Mr. Woods in the surveying business. Obviously a very educated man.

Q. What was their knowledge of the ability of the proposed horsepower as opposed to your knowledge, Mr. Smith?

Mr. Vickery: I think that is a question that would be impossible for this man to answer.

The Court: Sustain the objection to that.

Q. What was the function of Mr. Wood and Mr. Blakely at a meeting such as was called?

A. Their function was to be advisors to Dixilyn's people as well as the underwriters for the rig.

Q. You didn't ask them there at all?

A. No, sir. We found them there when we walked in.

Q. You didn't know they were going to be there?

A. Had no idea.

Mr. Kohlmeyer: That is all.

Recross examination.

By Mr. Vickery:

Q. I just want to be sure I understand, Mr. Smith. Are you now trying to say directly or indirectly to the Court that you abdicated your function as the expert tower in this case to Mr. Woods and Mr. Blakely?

[fol. 182] A. To everyone present.

Q. Sir?

A. No.

Q. You are not trying to leave the impression with the Court you turned over your job as the expert tower and as the expert in charge of this flotilla to Mr. Wood or Mr. Blakely?

A. No, sir. They were experts themselves, and they just concurred in what I had recommended.

Q. And you still retained your position in the whole job as the expert in charge of towing this rig down from Vicksburg?

A. That is correct.

Q. And you didn't expect Mr. Blakely or Mr. Wood to take over your job as the expert in charge of this tow?

A. No. I don't think Mr. Blakely or Mr. Wood were qualified to navigate the tow down.

Q. I was interested in one other thing, and I just want to clear it up, because I misunderstood your answer to one

of my questions, if I heard your answer to Mr. Kohlmeyer correctly. Did you say that none of Crescent's personnel had anything to do with the lowering of the legs?

A. The physical lowering of the legs, no, sir.

Q. That is the point I want to make. But it was Captain Brechtel's duty in charge of the flotilla to tell Dixilyn [fol. 183] employees when it was safe to lower the legs? Isn't that true?

A. That is correct.

Q. In other words, they couldn't start lowering the legs until Captain Brechtel told them he had the flotilla in such a position and under such control that it was safe to do so?

A. There again we get into a question that Brechtel's authority did not supersede Dixilyn's authority on their own there. They could have thrown Brechtel off any time they made up their mind to. He was there to advise them when to start lowering the legs. We have no control over that as such. He advised them when to drop them and they advised him when they were low enough to clear the bridge.

Q. It was Brechtel's basic job to advise them when the flotilla was in such a position in the river it was reasonably safe to lower the legs?

A. That is correct.

Q. And if Dixilyn was carrying out its phase of the job in the overall towing operation, they would have relied on Brechtel as the expert pilot with knowledge of the contours of the river and wait until he gave them the word?

A. Right.

Q. Now then, as I understand it, you don't have any in- [fol. 184] formation and didn't have at the time you suggested this horsepower, with respect to the size, shape or construction of the legs on the Julie Ann? Is that right?

A. Pardon?

Q. At the time you suggested the horsepower to be used in handling this tow, you didn't have any idea with respect to the size or the shape or the construction of the legs on the Julie Ann?

A. Oh, yes, we did.

Q. You had that information?

A. Yes, we were furnished a booklet on that rig when we went to the meeting.

Q. You had full knowledge of the construction of the Julie Ann at the time you suggested this horsepower?

A. Yes. She was practically a duplicate of—except the longer legs—outside dimensions were the same except she did have longer legs.

Mr. Vickery: I believe that is all.

Re-redirect examination.

By Mr. Kohlmeyer:

Q. If Mr. Blakely or Mr. Wood had said that they wanted more horsepower than you suggested, would you have acceded to their request?

[fol. 185] A. Yes, sir.

Q. Did it make any difference to you how much horsepower was used?

A. No, sir. Dixilyn was going to pick up the tab in the final analysis. My personal pride would not have been hurt if they had recommended more power. We would have just made it available to them.

(Witness excused.)

* * * * * * * *

[fol. 186] Warren Apgar, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Kohlmeyer:

Q. You are Mr. Warren C. Apgar?

A. Yes, sir.

Q. You live in New Orleans?

A. I do.

Q. You are the vice president of Crescent Towing and Salvage Company?

A. Yes.

Q. And you are also vice president of various other of the Smith enterprises in New Orleans?

A. Yes, I am.

Q. How long have you been in the shipping business, Mr. Apgar?

A. Since 1935.

Q. With whom?

A. I started out with Lykes Brothers Steamship Company, and I spent five years in the Army in the Water Division, and then was in the steamship business in New York for five years and then returned to New Orleans and was in the tank terminal business for two years, and went with Crescent Towing and Salvage Company and T. Smith [fol. 187] and Son in 1950 and have been with them since.

Q. Are you familiar with the operations of Crescent insofar as the towing is concerned?

A. Yes, I am.

Q. Are you familiar with your competitors in the area?

A. Yes, I am.

Q. State, please, for the record what your competition is in and about the harbor of New Orleans and upriver as far as Memphis.

A. Well, our competition is roughly in two phases. We have our harbor competition, which was Whiteman and Bisso—Edwin Bisso and Willie Bisso—and then we have tidelands competition, and we have the tideland oil fields. We compete with G and H Towing Company, Harry L. and J. Ray McDermott, and many other small companies operating vessels of lower horsepower than ours. The harbor towers make various trips up the river, principally in connection with movements in and out of New Orleans from upriver ports from time to time. It doesn't happen too often.

Q. Crescent is not certificated or regulated as a carrier?

A. No.

Q. It has no regular runs?

A. No, we have no regular runs.

Q. Do you know anything about the upriver business of [fol. 188] the towboats on the river?

A. I have a general knowledge of that business.

Q. How many towboats would you say are of the class of the Ouachita or the Toltec that might have been used in this movement or that were available to be used in this movement?

A. Well, there are roughly many hundreds of them more or less of the Ouachita type. There are fewer of the Toltec type. However, as to the availability, you catch them as they come by with their tows or that are available in between their regular runs.

Q. It is a question of availability and the spot, and the nature of the towage, rather than the availability of the vessel itself?

A. That is correct.

Q. And there are many hundreds of these same types of vessels about the river?

A. Right.

Q. —that could have done the work if they had been in the Vicksburg area?

A. Right.

Q. And if they had not been in the Vicksburg area, you could have gotten them, but you would have had to pay sailing time?

A. That's correct.

Q. That is true of the harbor tugs?

[fol. 189] A. The harbor tugs you have even greater flexibility because you have shorter distances.

Q. Are you familiar with the negotiations that led up to the movements of the Dixilyn from Vicksburg to New Orleans?

A. Yes, sir.

Q. Are you familiar with the contracts that were finally —of the letter exchange that was finally consummated between the two companies?

A. Yes, sir.

Q. As a matter of fact, you wrote the letters of December 19th and December 23rd, did you not?

A. I did.

Q. Were you present at the meeting referred to in the letter of December 19th at Dixilyn's office in New Orleans?

A. Yes.

Q. Who was present?

A. Mr. Boring, president of Dixilyn Drilling Company; and Mr. Brigham, executive vice president of Dixilyn; Mr. Tidwell, Mr. Brigham's assistant, I believe; and Mr. Charlie

Wood and Mr. Blakely, who were introduced to us as marine surveyors representing underwriters.

Q. Who called the meeting? Do you know?

A. Yes. I was either called by Mr. Brigham or Mr. Tid- [fol. 190] well and told that Mr. Boring was in town and it would be a good time to come over to discuss the tow from Vicksburg.

Q. Did you know that Blakely and Wood would be there when you got there—before you got there?

A. No, sir.

Q. Did you know anything about their insurance before you got there?

A. No, sir.

Q. Will you state, please, briefly—because I know you were in the room when Mr. Smith was testifying—what happened at that meeting insofar as the conversations and negotiations were concerned?

A. Well, of course, first of all we talked about as to when the rig would be ready to move down, and it was quite a bit of discussion about that because, as you know, it started out on the 26th, the day after Christmas. That was discussed, and then the question of horsepower was discussed principally between Mr. Smith and Mr. Blakely and Mr. Wood. We had, before coming to the meeting, we had just a general idea as to this Dixilyn rig, since it was bigger than any other rig we brought down, and we had not seen any blueprints or any other—had anything else but a general conversation over the phone about it with [fol. 191] Mr. Tidwell or Mr. Brigham, and we had shown to us the brochure they put out, and Mr. Mike Smith gave Mr. Blakely and Mr. Charlie Wood our ideas as to the power to be used in the tow, and in this connection Mr. Wood or Mr. Blakely suggested that the Ouachita was in the area there at Vicksburg and did we contemplate using her, and we said we did. And we also told them that we would use the Orleans and contemplated using a tug of the horsepower 3600 to four thousand, and asked them if that was in their opinion sufficient. And they agreed that it was, and we told them we would attempt to get the Toltec. However, a lot of it depended upon the position of that vessel as it related to her regular run. Then the question

was brought up by Mr. Wood or Mr. Blakely with Mr. Smith as to whether or not Mr. Brechtel would be along running our end of the operation, and we told him that he would be. Then we discussed where we would tie up the drilling rig in New Orleans and also could we help them with regard to—I don't know whether it was the registration and documentation of the Dixilyn rig at the custom house, since we have an agency department in connection with our stevedoring business, and we said we would be glad to do that. And we also told them we would [fol. 192] get them some names of Coast Guard people and port people that could be invited to the christening ceremonies. I brought up the question of the agreement for bringing the rig down and mentioned that, as customary, we would have to have a tower's release clause, and Mr. Boring at that point said, "Well, we won't discuss that now. We just want to get these general facts behind us and line up the tow down here. The technicalities can be discussed at a later meeting."

Q. Do you recall a discussion about taking some part off the legs?

A. Yes. It was during the conversation with Mr. Smith and Mr. Wood or Mr. Blakely, and Mr. Smith suggested sixty feet, and Mr. Brigham at that point said, "They are going to have thirty feet off." And then Mr. Wood and Mr. Blakely discussed with Mr. Smith as to how that would affect the tow, and it was agreed by Mr. Wood and Mr. Blakely that thirty feet would be sufficient, and we went along with that.

Q. Was the horsepower of the various vessels which were contemplated discussed by the three Dixilyn officials that were there?

A. I don't recall that it was.

Q. They took no part in that, to your recollection?

[fol. 193] A. No, not to my recollection. That was left with Wood and Blakely.

Q. But they did agree that the horsepower suggested was proper?

A. Yes.

Mr. Vickery: You mean by "they," Wood and Blakely?

Mr. Kohlmeyer: Yes.

The Witness: Wood and Blakely.

Q. With no dissent from Dixilyn?

A. Oh, no.

Q. After that meeting, did you write any letters to Dixilyn?

A. No, I did not write them until after the second meeting that we had in their office.

The Court: This is a good place for a ten minute recess.

(Whereupon the hearing was recessed for ten minutes.)

After Recess

Mr. Kohlmeyer continues:

Q. Mr. Apgar, I believe we were up to the point as to the [fol. 194] letters that you wrote. Did you write letters dated December 19th and December 23rd to Dixilyn?

A. Yes, sir, I did.

Q. Those are the letters that have already been identified that you are familiar with, of course?

A. Yes, sir.

Q. Following your second letter of December 23rd, did you receive back from Dixilyn a copy signed, "Approved, Dixilyn Drilling Corporation, by Russell B. Tidwell"?

A. I thought you wanted me to tell about the second meeting.

Q. No, just answer that question first. Did you receive back the letter of December 23rd signed by Mr. Tidwell as I just asked you?

A. Yes, sir.

Q. Now, let's go back then, Mr. Apgar, and talk, before we get to the letter writing, about the second meeting that you had. I think that meeting took place sometime immediately prior to the 19th of December?

A. Yes, sir.

Q. Who was present at that meeting?

A. This was the meeting that was called at a suggestion of Mr. Boring in the first meeting, at which we were to discuss the towage release aspects of this operation, and

[fol. 195] I was called by Mr. Tidwell and asked to come over on a particular afternoon; and Mr. Landman, who is now deceased, who was vice president of Crescent at that time, who was handling insurance matters for Crescent at that time, went with me, and we got over into Dixilyn's office and found Mr. Tidwell; Mr. Giffin, G-i-f-f-i-n, president of the Southern Marine and Aviation Underwriters; and Mr. Stentz, who was vice president of Southern Marine and Aviation Underwriters; who were introduced by Mr. Tidwell as underwriters of the rig Julie Ann. And the conversation was principally between our Mr. Landman and Mr. Stentz and Mr. Giffin.

Q. Was Mr. Tidwell present at all times?

A. Yes.

Q. And all conversations were within his hearing?

A. Oh, yes.

Q. Proceed.

A. And it was our intention that we have a towage release clause that would relieve us of any and all liability in connection with the tow of the Julie Ann from Vicksburg to New Orleans, as was customary in the past, towing this type of rig.

Q. Is the towing of this type of rig particularly dangerous or particularly hazardous?

[fol. 196] A. Yes. In the first place, it is an unusual sized object, and with those legs and having to go through, I think, three bridges, and with the river traffic, we felt that it's an extremely delicate operation to bring that type of unit that far in the more or less confined waters.

Q. In no sense of the word is this an ordinary towage movement?

A. We didn't consider it so, which was the reason we required the towage release clause. The upshot of the meeting was that Mr. Giffin or Mr. Stentz suggested that we return to the office and submit to them our ideas as to—and submit our ideas as to the towage release clause, which occasioned my writing a letter of December 19th, after consultation with our attorneys and Mr. Landman.

Q. After you wrote the letter of the 19th, did you hear from Tidwell or anyone else in the Dixilyn organization?

A. Yes. Mr. Tidwell called back and said that the attached clause was not—the clause that we had attached to the letter of December 19th was not to the liking of the Southern Marine and Aviation, and that he was not an insurance man and would not object to talking to Mr. Stentz. I phoned Mr. Stentz, and he suggested another clause which [fol. 197] he—I don't recall whether he gave it to me over the phone or sent me a copy of it—In any event, after receiving this clause, I discussed the clause with our admiralty attorney and Mr. Landman, and we wrote Dixilyn again on December 23rd and elaborated somewhat on Mr. Stentz' clause. This is known as the first letter of the 23rd. And I then received a call from Mr. Stentz saying that he did not like the first sentence in there and—I'm not an insurance expert either, but as I recall the reason he did not like it was because he said if that sentence remained in there, that if one of our tugs had an accident on the way to Vicksburg that Dixilyn would be responsible. But, of course, that wasn't our idea at all to have them responsible until they actually got hold of the rig. So we agreed to delete it, and the second letter of the 23rd was submitted without the first sentence and was submitted to Dixilyn and was approved and signed by Mr. Tidwell and returned.

Q. Now, Mr. Apgar, in the course of the second meeting with Mr. Tidwell, Giffin, Stentz, you, and Mr. Landman, was there a discussion as to the release clause and what was to be released in that clause?

A. Yes. It was put forth by Mr. Landman that we had to [fol. 198] have a complete release from all third party liability and from the negligence of our employees or any other, any and all reasons. A complete release.

Q. Did Mr. Tidwell object at all to that type of course?

A. No, sir. I might say here that in both meetings that insofar as the technicalities of the tow and other insurance, Dixilyn appeared to be completely guided by the Southern Marine and Aviation representatives, marine surveyors, and their insurance people.

Q. Did you know what insurance Dixilyn had on the barge prior to the time you had written the second letter?

A. That came up in the discussions with Mr. Landman and Mr. Stentz and Mr. Tidwell, and that there should be

insurance at least to the value of the rig. As I recall, it was four million dollars.

Q. Prior to the time you went into those meetings, did you have any notice at all or knowledge at all of the insurance that existed on the rig?

A. No, sir.

Q. Had you any knowledge as to the place or the part that Southern Marine and Aviation played in placing the insurance?

A. Well, we understood that they were Dixilyn's underwriters. That's all.

[fol. 199] Q. Do you know there were excesses on top of excesses?

A. No.

Q. Do you know who the primary carrier was?

A. No, sir. We didn't know any of the details.

Q. Did you ever see any of the policies as of this time?

A. No, sir.

Q. Copies of them?

A. No, sir.

Q. No cover notes either?

A. No.

Q. You didn't see any policies before the movement of the rig?

A. No, sir. We just had these conversations with Giffin and Stentz, and it was obvious from the talks that the rig was covered.

Q. Now, Mr. Apgar, you carry at least in excess of fifty thousand dollars P & I and Hull with collision clause and tower's liability on the Orleans, do you not?

A. Yes, sir.

Q. Do you know the amount of the premium you pay for that?

A. No. We have a fleet policy, and I guess it could be broken down tug by tug. We pay a percentage on the valuation of the fleet.

Q. But you don't know that offhand?

A. It's in the neighborhood of between five and six percent.

[fol. 200] Q. On the value of each of your tugs?

A. Yes.

Q. For both P & I and Hull? —Well, let me ask you—

A. —I'm not sure.

Q. If we want to get that information, that can very easily be determined through your brokers in New Orleans?

A. Yes.

Q. And an accurate statement of the cost of your insurance can be obtained and submitted to the Court and to counsel?

A. It can be.

Q. And you will do that if we ask you to?

A. Yes.

Q. Do you have any idea as to the type of cover that is afforded by your P & I and collision clause and do you know generally what those clauses mean?

A. Yes, I do.

Q. Do you know how your rate is computed?

A. Yes.

Q. State briefly, if you will, to the Court how your and, in general, how all marine insurance rates are computed.

A. Well, it's computed, I guess, as almost all insurance is generally computed, and that is on your experience. [fol. 201] And if we have several bad years, our insurance costs go way up. I mean by that, they are liable to go up from, say, four percent to six or seven percent, depending upon the seriousness of the losses.

Q. When you say "losses," you mean damage claims?

A. Damage claims and reserves and so on.

Q. Do you know who was on the tug Orleans at the time of the collision with the bridge?

A. No, sir.

Q. Do you know if Brechtel is still in your employ?

A. He is not.

Q. When did he separate? Do you know, just approximately?

A. About a year ago.

Q. Was it voluntary or involuntary?

A. It was voluntary.

Q. Do you consider him a capable master?

A. Yes, we do.

Q. Thank you. That is all.

* * * * * * *

[fol. 204] Cross examination.

By Mr. Vickery:

Q. Mr. Apgar, as I understand your testimony at this time, the sole agreement you had with Dixilyn Drilling Corporation with respect to moving this towage in tow, insofar as any release of liability of Crescent is concerned, is embodied solely in the second letter of December 23, 1957?

A. No, sir. It encompasses the letter of December 19th, as the second letter states in the first or second paragraph.

Q. I understood after the second letter of December 19th that Mr. Tidwell called you and told you that letter or the clause attached to that letter was not acceptable to Dixilyn. Is that correct?

A. The clause was not acceptable. However, there is another part of the first letter that we very definitely understood would be part of the agreement, and that is that we would be included in Dixilyn's coverage.

Q. That you would be named an additional assured in their policies?

A. Yes, sir.

Q. You requested them to furnish you proof of that, did you not?

A. Yes, sir.

[fol. 205] Q. And the normal and routine thing to do if that provision is to remain in force and effect is for you to decline to furnish the tow until you have been furnished that proof?

Mr. Kohlmeyer: I object. I don't know of any normal provision. If there is complete trust on both sides, I don't see why there should be a written confirmatory agreement. I don't think it customary at all.

The Court: Overrule the objection.

A. We felt that we were dealing with people that we could trust and they understood that through the conversations that we had had, and to call them up and— You see, that letter was written on December 23rd, and to call them up on Christmas Eve and say, "We are not going

to handle your tow because you haven't given us a certificate," I think would have been highly impractical, because we had to get the tugs going to be up here for the day after Christmas.

Q. Let me ask you this, Mr. Apgar. Then it is not your policy, notwithstanding your request, as reflected by your letter of December 19th, that you be furnished either a letter or a telegram confirming this, it is not your practice [fol. 206] to follow up on that? You just throw that in for so much lagniappe? Is that right?

A. If we had had time to follow up on it, we might have done so.

Q. You had from the 19th to the 26th, seven days.

A. No, we didn't have that long. We didn't have a signed agreement until probably the 24th, which is the day before Christmas, and how he would get us certificates and everything wrapped up over there on Christmas Eve— You know what it's like on Christmas Eve.

Q. Mr. Apgar, I want to be sure I'm clear as to what you say the contract was between Crescent and Dixilyn with respect to the letters of December 19th and December 23rd.

A. The only thing—

Q. —Here's a letter of December 19, 1957. Will you tell me what parts of that letter, if any, you considered to be a part of the contract, insofar as it might relate to any release of your liability?

Mr. Kohlmeyer: I submit this is highly improper questioning. It invokes the province of the Court; it is for the Court to decide. This question of the interpretation of the [fol. 207] letter was brought up by the respondent, by Dixilyn, and not by us; and the question of what is included and what is excluded from the written letter, I submit, is certainly not within the province of the witness to testify to. It is up to the Court to determine.

The Court: Overrule the objection.

A. I don't mind answering the question. It was the attachment here that was superseded. This attachment was superseded by the clause in the signed letter. It was superseded by the second and third paragraphs. And that second and third paragraph simply supersede the attached

clause on the letter of December 19th, as it points out very clearly in the letter where it says, "This portion of our agreement . . ."

Q. Now then, so everything in the letter except the copy of the towage release clause—

A. —which was attached.

Q. —which was attached, insofar as the letter of December 19, 1957, is concerned, you considered to be accepted by Dixilyn?

A. Yes, sir.

Q. Now, let me ask you this, Mr. Apgar. Why did you consider it was necessary to have Dixilyn sign the letter [fol. 208] of December 23rd evidencing their approval of it, and yet you were willing to accept their oral approval of the letter of December 19th? That is rather unusual, isn't it?

A. No, because the letter of December 23rd tied in the letter of December 19th.

Q. I see. So your practice simply is to confirm conversations you have with respect to movements such as this by letter such as that one of December 19, 1957, without requesting anyone to accept or assent with respect to that letter? Is that your normal practice?

A. Yes.

Q. Yet you felt it was necessary as to the December 23rd letter that it be signed and approved? Is that correct?

A. If the December 23rd letter was the final letter, would have had to be signed and approved, but it was followed by the letter of December 19th which tied in the letter of December 23rd—which December 23rd letter followed up the letter of December 19th, and the letter of December 23rd tied in with the letter of December 19th; so by signing the letter of December 23rd, they agreed to the letter of December 19th.

Q. I see. Even though the letter of December 23rd said [fol. 209] "If the foregoing meets with your approval and represents this portion of our agreement . . ." you considered the assent on December 23rd to be an assent to the letter of December 19th too?

A. Will you restate that?

Q. The last paragraph in the letter of December 23rd says, "If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter." Are you trying to say the approval on the 23rd letter also amounts to approval of the provisions in the letter of December 19th?

A. It does, with the exception of that portion which, as I stated before, the portion referred to was the attachment to the letter of December 19th.

Q. Now, is it fair summation, Mr. Apgar, to say that what you, in consultation with your attorneys—I assume, Mr. Kohlmeyer,—

A. That's right.

Q. —were trying to do in drawing up these various clauses which you submitted to Dixilyn after they had been approved by Mr. Kohlmeyer— Is it fair to say that what you were trying to do was to relieve Crescent Towing and Salvage Company of any and all liability they might [fol. 210] have for any and all damages that might arise out of this towage operation?

A. That is correct.

Q. Whether caused by your negligence or otherwise?

A. That is correct.

Q. Without any reservations?

A. Exactly.

Q. Even if Brechtel had gone berserk or had come on the job in such a shape he couldn't handle it and had intentionally run into the bridge?

Mr. Kohlmeyer: I submit the hypothetical question is improper.

Mr. Vickery: I withdraw it. It was poorly phrased, Your Honor. I withdraw it.

The Court: All right.

Q. Even if there had been some intentional damage by your pilot, which might seem incomprehensible?

A. We wouldn't have been hired by Dixilyn if they thought we were capable of mishandling, to send a drunken man on the boat.

Q. I'm asking you what you tried to do with this contract insofar as traffic liabilities were concerned, and I believe you told us you were trying to relieve Crescent of [fol. 211] any liability, however it might be sustained.

A. That's right.

Q. And that included any intentional damage your tug people might do?

A. Included any and all damage.

Q. Including intentional negligence and otherwise?

A. Correct.

Q. Now then, Mr. Apgar, you never had any conversations at all with Dixilyn's people with respect to the rates that were to be charged in connection with this movement, did you?

A. No, because the only rate we could give them definitely was the rate on the Orleans, and we didn't know just what tugs we would be able to get at the time for this movement. We had hoped, of course, we would get the Ouachita and Toltec, but at the time of the meetings we did not know definitely we would be able to get those vessels.

Q. And they left the question of the rates and the amount of money to be paid for the tows to be used in this operation entirely in your hands, did they not?

A. We told them that we would do the very best we could do on that, yes.

Q. They left it entirely in your hands, didn't they?

A. Yes, they never questioned that phase of it.

[fol. 212] Q. Never questioned it. In fact, they had no knowledge until they got your invoice as to how much this movement was going to cost them?

A. Yes, we assured them whatever— We would make sure these charges were reasonable.

Q. I'm talking about dollars and cents. They had no idea what it would cost in dollars and cents to make the movement?

A. I don't know whether they did or not. We didn't give them any idea that I recall.

Q. Now then, what rate did you charge on the Orleans per hour?

A. Thirty-five dollars.

Q. That is your usual and customary charge on the Orleans?

A. Yes, sir.

Q. Regardless of what kind of contract you may have in connection with the use of that vessel?

A. It's for— Thirty-five dollars an hour is for a normal operation with the Orleans.

Q. Whether you furnished the insurance or somebody else furnished the insurance, your normal charge for the tug Orleans is thirty-five dollars an hour, isn't it?

A. It depends again here on the type of operation. If it's an extremely risky operation, the charge per hour if we [fol. 213] provide the insurance would be considerable more. If it's a normal type of operation, the thirty-five dollars would apply with us supplying the insurance.

Q. Did you mention any difference in rates that would be charged to Dixilyn at the time you were talking to them about this contract?

A. No, we told them we would charge the normal rates.

Q. Now then, Mr. Apgar, let me ask you this. Assume that you had not been able to get Dixilyn's acquiescence to any of the clauses whereby you attempted to relieve yourselves of liability for any damages that might have been sustained, would you then have had to go to your underwriters and ask them to write you a policy covering the tug Orleans on this tow and pay them an extra premium for it?

A. What we probably would have done, we would have gone to our underwriters and asked them to write a special policy for this tow so that if there was any accident that it would not go against our experience.

Q. You don't have any idea what that policy would cost?

A. I imagine it would cost probably ten percent of the craft to be towed.

Q. That is a rough approximation?

A. No, because we just had that recently in connection [fol. 214] with towing another drilling rig.

Q. I see. Now then, Mr. Apgar, do you have anything at all to do with the arrangements of the Toltec—

A. —I'm sorry. Excuse me. It was one percent; not ten percent, because it seemed like such a fabulous amount. It was one percent for the one trip.

Q. Now then, Mr. Apgar, do you have anything to do with the arrangements to be made for the Ouachita or the Toltec?

A. Yes. I talked to Mr. Jack Neilson, who made those arrangements for us.

Q. Did you in arranging those two tugs to assist in this towing operation get any quotations with respect to the rates they would charge on the basis of whether their insurance was likely to be involved or not?

A. No, sir, we didn't, because they made it clear to us that they would look to us in the event of any damages.

Q. So you didn't solicit a different quotation in rates insofar as those two tugs were concerned?

A. No, sir, we felt we were fortunate in getting tugs as good as that for this job.

Q. I see. Now then, this was the normal— The rate you paid for those two tugs was the normal and routine charge those two tugs made in connection with their usual opera-
[fol. 215] tions?

A. Yes, that was a normal charge for that size tug, yes.

Q. That size tug.

A. Those towboats.

Q. There was never any quotation or any indication given to Dixilyn of any kind that it would cost them so much to move this rig if they bore the brunt of the insurance and it would cost them so much more if you bore it?

A. That question never arose.

Q. You never attempted to give them a choice as to which way they wanted to do it?

A. They never indicated they wanted a choice.

Q. Now then, Mr. Apgar, this last letter of December 23rd which was finally sent to Dixilyn and approved by them, that was drafted, was it not, with the advice and counsel of your attorney?

A. I talked to the attorney before I sent it. It was drafted, that clause we were discussing, was drafted by Mr. Stentz and in consultation with Mr. Landman and myself.

Q. Now, Mr. Apgar, in any of your conversations with your attorney in connection with this particular clause and the drafting of it, were you advised that in order for a towing company such as you to be relieved of all your lia-

[fol. 216] bility, including that of negligence, that it had to be clearly and unequivocally spelled out in the contract?

A. Sir?

Q. Were you advised in connection with the drawing up of this contract where you were attempting to relieve yourself of any and all liability, including that for your own negligence or the negligence of your own employees, were you advised by your attorney that in order to do that, such an agreement to relieve you of your liability for negligence had to be plain and unequivocal?

A. I assumed that it was, and I don't know that I asked that particular question, but in order that both parties might understand it, I assumed that such a clause was necessary. I remember that my attorney made a big point of it. I think it was mutually understood.

Q. You were familiar with the fact that in order for the clause to have any validity at all, a release for your liability of negligence has to be spelled out in the plainest of words? Are you familiar with that requirement?

Mr. Kohlmeyer: I submit that is a question of law.

The Court: Sustain the objection.

[fol. 217] Q. Mr. Apgar, as I understand it, the barge Julie Ann was bigger than either of the previous two rigs which Crescent had brought down from Vicksburg?

A. Yes, sir. The legs were bigger. I'm not a technical man, but the legs were bigger, and I understand it had heavy machinery on it, but insofar as the barge section was concerned, I don't know that the barge part was bigger.

Q. But you were aware of the fact that it was a bigger tow than had been handled previously?

A. Yes.

Mr. Vickery: I believe that is all at this time.

The Court: You may stand aside, Mr. Apgar.

* * * * * * *

[fol. 354] HARRY BRIGHAM, called as a witness and having previously been sworn, testified as follows:

Direct examination.

By Mr. Watkins:

Q. Are you Mr. Harry Brigham?

A. That's right.

Q. Are you the same Mr. Brigham who was called as an adverse witness earlier in this case?

A. I am.

Q. Mr. Brigham, you, I believe, are the executive vice-president of Dixilyn Drilling Corporation?

A. That's right.

Q. Is Mr. Russell Tidwell an officer of Dixilyn Drilling Corporation?

A. No, sir.

Q. Please tell the Court whether Dixilyn Drilling Corporation employed Mr. Charles Wood to do anything in con-
[fol. 355] nection with the movement of the Julie Ann?

A. No, sir, we did not. Charlie Wood's company, as has been previously stated, is a marine surveyor, and his attendance on the vessel— Let me back up. They had Mr. Blakely during the construction of the vessel in attendance to assure themselves that the construction was satisfactory.

Q. Who had Mr. Blakely?

Mr. Kohlmeyer: At this time we should like to object to any evidence which would tend to show or attempt to show that Mr. Wood and Mr. Blakely were not the representatives of Dixilyn, on the theory of estoppel and a holding out to that extent. I understand, of course, Your Honor may not be able to rule on that at this time, but we want to preserve our rights.

The Court: Very well. I'll overrule the objection and give you a standing objection to testimony of that nature because there has been testimony with reference to their conduct, and I think it competent to show just exactly what the status of Mr. Wood and Mr. Blakely was.

Mr. Watkins: And we objected throughout the trial to his testimony on the ground he was not our representative.

[fol. 356] A. Following the completion of the vessel then, their attendance on the vessel was, as is described, accident prevention control, merely to report on any happenings to their employers.

Q. Who is their employer?

A. Southern Marine nd Aviation Underwriters.

Q. Tell the Court, Mr. Brigham, whether Dixilyn Drilling Corporation authorized Mr. Charles Wood to exercise any control over the movement of the Julie Ann from Vicksburg to New Orleans.

A. No, sir, we did not.

Q. In any negotiations with Crescent for the movement of the Julie Ann, did you intend for Dixilyn to protect Crescent from the results of Crescent's negligence?

Mr. Kohlmeyer: We submit that question is highly improper; as to what his intention was is of no material relevancy.

The Court: Overrule the objection.

A. No, sir, we did not.

Q. Did you authorize Mr. Tidwell to enter into any such agreement?

A. No, sir, I did not.

Q. Why did you permit Mr. Tidwell to approve what has [fol. 357] been introduced as an exhibit, the letter of December 23, 1957, from Crescent to Dixilyn?

Mr. Kohlmeyer: The question of Mr. Brigham's subjective frame of mind as to why he permitted someone to sign something, we submit, is of no materiality.

The Court: Overrule the objection. As I see it, he is leading up to the authority, probably, of Mr. Tidwell.

Mr. Kohlmeyer: He has already testified he had that authority.

Mr. Watkins: It is a question of intent. He has gone into great detail as to what their intent was.

The Court: Overrule the objection. I'll let him answer.

Q. My question was why you permitted Mr. Tidwell to approve the letter of December 23, 1957.

A. This is the letter that had his signature on it after the first one was submitted?

Q. Yes, sir.

A. The reason that was approved, or it was approved for him to sign, it was our understanding that— This is his report to me, of course—that—

[fol. 358] Mr. Kohlmeyer: —It would be highly hearsay.

The Court: Overrule the objection. A lot of hearsay has gone in between the various parties. I want the whole story now.

A. —That he had consulted with Mr. Stentz or Giffin—I don't know which—of Southern Aviation Underwriters, and was advised that the letter in itself, or the contents of the letter, that it was not legally enforceable and it was permissible to go ahead and sign it, that if that's what they wanted, it was perfectly all right.

Q. Mr. Brigham, did the negotiations between Crescent and Dixilyn in December, 1957, have anything to do with the lengths of the legs on the Julie Ann on the trip down the river?

A. No, sir. I think, as my testimony the other day, that in the discussion of the size of the vessel and the conditions under which it would be brought down the river, that it was stated that at that time there would be thirty feet of leg added after it reached the New Orleans area, and that the derrick would be completed at that time; where, when it left Vicksburg, there was only the starting legs up on the derrick, and the rig or equipment would be completely outfitted after reaching New Orleans.

[fol. 359] Q. At the time of those negotiations between Crescent and Dixilyn in December, 1957, would there have been time remaining to make any changes in the specified length of the legs before leaving on the 26th of December?

A. No, sir. I might state this: that additional thirty feet of leg represented one hundred thousand dollars, and when the contract was originally negotiated with LeTourneau, that was all set out, the design and manner in which it would be equipped when it left Vicksburg and the manner it would be finally equipped after it reached New Orleans, the final equipment to be placed aboard. It would be extremely costly, but it was never discussed.

Cross-examination.

By Mr. Kohlmeyer:

Q. Did you advise Crescent that you had signed that contract because you knew it was unenforceable?

A. No, I did not advise Crescent. Following the signing of that, I don't believe that I ever had any conversations with Crescent.

Q. Is it customary in the handling of your business that you execute agreements that you know you aren't going to live up to?

[fol. 360] A. It is— Well, I will have to put it another way. Certainly every agreement that is written in our business does not completely hold you liable for the— I'll have to rephrase that. There is always that area in there that allows you some elasticity in drilling contracts, et cetera. Now, as I stated, the whole discussion concerning this, and, understand, I was not in on this portion of it, was that this was what they wanted, that Mr. Tidwell advised me that he had been advised by Mr. Stentz or Mr. Giffin that it was not legally enforceable but if that is what Crescent wanted, that it was perfectly all right to go ahead and sign it; that there were several cases suggested to him where it had already been tried—I don't recall the cases or conditions, but—

Q. Sir, under those conditions, would you not consider it good form, good judgment, good business practice and honesty with your contractors to advise them of that fact?

A. I suppose, in retrospect, I would have to admit to that, yes.

Q. Do I understand your testimony to be that you instructed Mr. Tidwell to sign this agreement on behalf of Dixilyn, knowing or in the belief—which you did not communicate to Crescent nor did anyone else in your or-[fol. 361] ganization—that you were agreeing to something, but you were not going to conform to your agreement? Is that correct?

A. Here again I am going to have to go back to the thinking. At first the Tower's Release Clause was submitted or suggested; Crescent was entirely aware at the

time that we felt that that situation was not acceptable and that the whole area in which we were discussing here was a Tower's Release Clause in a different form.

Q. Now, you said that Crescent was aware of that. How do you know that?

A. I said that was the supposition on my part and the thinking that went into this, first, the receipt of the Tower's Release Clause, and then the letter written around such a condition.

Q. Now, getting back to the question we didn't answer just a moment ago. Do you state here in this courtroom that you deliberately instructed Mr. Tidwell to sign this contract, knowing that you were not going to live up to it and not advising Crescent in advance that you were not going to live up to it?

A. That part of it never entered my mind as to—that here again we were advised it was not legally enforceable; it was one of the things they wanted, and the thought [fol. 362] being here again that they knew it was not, but it was a position they wanted to take.

Q. That doesn't answer my question.

A. All right. I'll say yes. That is the situation under which I gave him the approval to sign that agreement.

Q. Intending not to live up to it.

Mr. Watkins: The law does not require a litigant to live up to an illegal contract.

The Court: Yes, sustain the objection.

Q. Did you consult counsel about this?

A. By "counsel," what do you mean?

Q. An attorney.

A. No, sir.

Q. Did you consult anyone about it yourself?

A. Personally, no, sir.

Q. You were content to take the information that you say Tidwell says he got from Giffin or Stentz? Is that correct?

A. Yes, sir.

Q. Now, going to the other part or parts of this agreement, this letter addressed to Dixilyn by Crescent, being the second letter of December 23, 1957, says that you, Dixilyn, "are authorized to and by this agreement do

[fol. 363] release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties, as well as any claim which may be urged by virtue of damage to the drilling rig in the course of this towage, shall be for your account and account of your underwriters. It is further understood that the amount of insurance protection which you have in force equals the value of the hull of the barge as to hull insurance, and amounts to four million dollars as to third party claims."

Now, which clause there did you say that Stentz or Giffin said was illegal?

A. Now, as I remember Mr. Tidwell's report to me, it was that they said that no one could sign away their liability, meaning that Crescent could not sign away, under any circumstances, their liability.

Q. Is Dixilyn a contract driller?

A. That is correct.

Q. Do you have contracts with major oil companies?

A. That is correct.

Q. You have executed hundreds of them, haven't you, Mr. Brigham?

A. I wouldn't say during my contracting days I have executed hundreds; I would say perhaps fifty.

Q. Hasn't every one of those contracts had "hold harmless and indemnity" agreements in it?

[fol. 364] A. With majors?

Q. Yes.

A. Yes.

Q. When you sign such a contract, do you intend not to live up to it?

A. No, I don't say that our intentions are not to live up to it.

Mr. Watkins: I'm going to object to that.

The Court: Sustain the objection. I don't think the other contracts are material. You are getting too far afield.

Mr. Watkins: Not maritime, not admiralty law.

Q. Mr. Brigham, I think you were here in court yesterday when we introduced the copies of the insurance policies, were you not?

A. Yes, sir.

Q. Are you familiar with the insurance cover that we have in the courtroom here today, these Crescent Exhibits 7 and 8?

A. No, sir, I'm not. As I testified in my previous period on the stand, that in generalities, generally I am familiar with the fact we have insurance.

Q. If I told you that this insurance covered Crescent's liability in this case, would you know whether or not I was [fol. 365] right or wrong?

Mr. Watkins: We object to that. He is calling for the witness to—

The Court: Yes, sustain the objection.

Mr. Kohlmeyer: If the Court please, on the ruling, I submit I am only asking the witness if he knows whether or not it is covered, and I asked him if I told him that it was covered, would he know whether I was right or wrong. I am not asking him for an interpretation of those policies.

The Court: Yes, I think you are asking him for a question of law. Sustain the objection.

Q. Who negotiates Dixilyn's insurance?

A. Mr. M. O. Boring, Sr., Vice-President and Secretary-Treasurer.

Q. And he would be familiar with the type of insurance you carried and the reasons for carrying it and what the coverage would be, afforded by it?

A. A portion of your question, I'm certain. Now, again, we depend upon our insurance people for the type of insurance we need and how much we need. I doubt very much, not discrediting him any, but I doubt very much he is an expert on insurance.

Q. Do you consult with counsel when you insure?

[fol. 366] A. I have nothing to do with insuring, so I don't know what he does.

Q. I advert now to the Crescent letter of— Strike that. What position did Mr. Stenz and Mr. Giffin take in these negotiations leading up to this contract? I shouldn't say "position." I should say, what was their function in this area?

A. Strictly advisors.

Q. To whom?

A. To Dixilyn concerning the vessel and the conditions under which the agreement, I presume you would say, would be made.

Q. And Dixilyn was completely satisfied to rely on their advice?

A. That is correct.

Q. And you did ask them to advise you?

A. I did not.

Q. Well, your company did?

A. I'm rather certain that is so.

Q. Otherwise, they wouldn't have been at the meeting, would they?

A. May I expound on this? It is kind of like Crescent soliciting our business, that certainly they were soliciting business, and they also had an investment to protect.

Q. Well, they were paid for protecting their investment, [fol. 367] were they not?

A. That is true.

Q. Do you know whether or not Southern Aviation and Marine, which was the company of Giffin and Stentz, had written all of your insurance or only a portion of it? In other words, were they the brokers for the whole placement of the whole risk?

A. At the time I didn't know the relative position of it. Now I know the three coverages we have.

Q. Were they all written through Southern Aviation?

A. No. Brantz and Company in Fort Worth handled the writing of our insurance, the placement of it.

Q. As local agents?

A. Yes.

Q. Did they go through Southern Aviation as to all of it?

A. That I don't know, as I haven't had a copy of an insurance policy in my office on any of this up until this past month.

Q. Now, you say that Mr. Stentz or Mr. Giffin, one or the other, advised Mr. Tidwell and he advised you that this clause was invalid, and therefore you could sign the agreement? Is that correct?

A. Yes.

Q. Do you recognize that it states in there in that agreement that the release is for Dixilyn's account or for account of its underwriters?

[fol. 368] Mr. Watkins: I think it speaks for itself.

The Court: Overrule the objection.

A. Would you repeat it?

Q. The agreement reads: "It is particularly understood and agreed that you, Dixilyn, are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters." Now, was that the clause that you referred to that Tidwell or Stentz said was illegal and to go ahead and sign it?

A. That is my understanding.

Q. How about the rest of the clause: "that any damage claims urged by third parties in the course of the towage shall be for your account and for account of your underwriters."

A. The complete.

Q. In other words, both portions?

A. That is correct.

Q. And it is your understanding that Stentz told Tidwell that both for Dixilyn's account and for the underwriter's account, that clause was invalid and you could go ahead and sign it because it couldn't be enforced?

A. That is correct.

Q. You knew, of course, that Crescent was insisting on [fol. 369] this type of clause to go into the contract?

A. Yes, sir, I knew that there was considerable discussion around there.

Q. And you knew that this was the clause that they said was a condition to the towage at these rates?

A. I don't know that it was expressed exactly that way. Understand, I was not in on the discussion. I was merely receiving this information after the conferences were held.

Q. You don't know if Mr. Tidwell told that to Mr. Stentz or not?

A. I do not.

Q. You weren't present at any conversations with Mr. Tidwell or Mr. Stentz?

A. No, sir.

Q. Or Mr. Giffin?

A. No, sir.

Q. You understood that Crescent's intent in this clause was to shift responsibility from itself to you and your underwriters?

A. Yes, sir. I understood that, and, as I said, that was when the expression was made that they could not sign away their liability under the terms of their insurance and the terms of the Admiralty Law or whatever it was.

Q. And in the event this clause was not illegal, you un- [fol. 370] derstood that it was the intent of Crescent to get this release and to shift the liability over?

A. Well, I understood it was their intent, but during the same time it was my understanding they were as well aware of the situation as we were. That was my understanding. I don't say they were, but it was my understanding they were as aware as we had been advised.

Q. Did they tell you they knew such a clause was invalid?

A. Not to my knowledge.

Q. Where did you get that impression?

A. In the discussions surrounding this with Mr. Tidwell.

Q. This was again Mr. Tidwell's conveying to you what he said Crescent's impression was?

A. As I said, I don't know he specifically said—I said in the discussions concerning the meetings, that was my impression.

Q. Gained from Tidwell; not from Crescent?

A. That is correct.

Q. And in the event that this clause would not be illegal and would be enforceable, you now understand and then did understand that the intention and the effect of the clause was to shift liability from Crescent to Dixilyn?

Mr. Watkins: We object to that as calling for a legal [fol. 371] conclusion.

The Court: Overrule the objection. It is asking about what he understood.

A. I suppose had I dwelled on it, that would have been the conclusion I would have reached, but to my recollection, I don't recall having dwelled on that too seriously.

Q. Did you put any employees on the Julie Ann coming down from LeTourneau's?

A. Did we put any employees on the Julie Ann?

Q. Yes.

A. Yes. I don't know exactly who it was that crewed. Mr. Tidwell handled that phase of it.

Q. Do you know Mr. Hughes?

A. Yes, sir.

Q. Who was he?

A. Mr. Hughes was original — I hired Mr. Hughes, employed him. He was originally set up as project engineer on the construction of the vessel.

Q. You take the position that Crescent was in sole charge of this whole towage?

A. Yes, sir.

Q. Who ordered the tow to start out from Vicksburg?

A. Well, here again that would be— Not knowing until yesterday in the testimony here— I think the testimony [fol. 372] was that Mr. Hughes directed that it be started from Vicksburg.

Q. You saw the picture introduced as Dixilyn's 2, did you not?

A. Are you referring to the two tugs?

Q. Yes.

A. Yes, sir.

Q. And today you know as a fact the barge started out from Vicksburg without Crescent's being there?

A. Yes, I have heard the testimony to that, but I don't know where this picture was taken.

Q. The picture is your picture and not ours.

A. Yes, sir.

Q. And it was offered by your counsel as being taken during the course of the downbound towage.

A. That is correct.

Q. I don't think we want to challenge that, do we?

A. No. I said I don't know what position it was in at this time.

Q. You recognize Crescent wasn't there?

A. I wouldn't recognize that Crescent wasn't there.

Q. You see there is only two boats there?

A. Right.

Mr. Watkins: We object to that.

The Court: Sustain the objection.

[fol. 373] Q. Who ordered the tow to move?

A. When?

Q. When it left LeTourneau's plant.

A. According to the testimony yesterday—

Q. No, sir, not according to the testimony. Do you know?

A. No, sir, I do not.

Q. Who was authorized by Dixilyn to order the tow to move?

A. Well, I don't know that any authorization was ever discussed concerning the movement of the tow. I do know this: I do know that when the arrangements were made and the discussions relative to the tow that the Crescent would have their vessels there and their supervision there and that the tow would be made that morning.

Q. In the event that Crescent wasn't there, did LeTourneau have the power to start the tow down the river?

A. No, sir.

Q. You had no contract with the Toltec or the Ouachita, did you?

A. No, sir.

Q. You didn't even know necessarily that those two vessels would be on the tow?

A. Now, if you're asking for specifics, no, that is correct.

Q. And if the tow moved out of LeTourneau's without Crescent's being there, it must have moved by orders of [fol. 374] Dixilyn?

A. I would assume so.

Q. But you don't know that of your own knowledge?

A. No, sir.

Mr. Kohlmeyer: That is all.

Redirect examination.

By Mr. Watkins:

Q. When did you first learn that neither the Toltec nor the Ouachita were owned by Crescent?

A. I didn't learn that until we were discussing this thing prior to our pre-trial discussions.

Q. Recently?
A. Yes, just recently.

Mr. Watkins: That is all.

(Witness excused.)

[fol. 375] RUSSELL TIDWELL, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Watkins:

Q. Please state your name.
A. Russell Tidwell.
Q. And your age.
A. Thirty-three.
Q. Are you employed by Dixilyn Drilling Corporation?
A. Yes, sir.
Q. How long have you been so employed?
A. Four years.
Q. Are you an officer of the corporation?
A. No, sir, I'm not.
Q. Have you had any legal training?
A. No.
Q. Have you had any experience involving the interpretation of contracts?
A. No, sir, none at all.
Q. Mr. Tidwell, tell the Court whether Dixilyn—whether Crescent solicited the business of moving the Julie Ann down the river in December, 1957.
A. Yes, sir, they sure did.
Q. Do you recall Dixilyn's receiving a letter from Crescent dated December 19, 1957, with an attachment thereto [fol. 376] which purported to be an agreement with reference to the taking of the Julie Ann down the river?
A. Yes, sir.
Q. Did you understand the provisions contained in that letter in the attachment?

Mr. Kohlmeyer: I object. Whether Mr. Tidwell understood or not is of no moment, I submit.

The Court: Yes, I'll sustain the objection, but I'll let him answer the question for the benefit of the record.

Q. What is your answer as to whether you understood the provisions of the letter and attachment?

A. Ask me again now. I don't understand the question.

Q. As I understand it, you told me you received a letter dated December 19, 1957, from Crescent which purported to be an agreement with reference to taking the Julie Ann down the river. You received that letter. Now, my question was, did you understand the provisions in the letter and attachment?

A. No, sir, I didn't understand the legal aspects of it and the terminology.

Q. Do you recall receiving from Crescent to Dixilyn a letter dated December 23, 1957, with reference to the taking of the Julie Ann down the river?

[fol. 377] A. Yes, sir.

Q. Did you understand the provisions contained in that letter?

A. No, sir, I sure didn't.

Q. Why did you approve it, Mr. Tidwell?

A. Well, when I received the letter, I didn't understand it, so I had been advised and been discussing the matter with Mr. Giffin and Mr. Stentz, who are with Southern Marine and Aviation Underwriters, so I called them when I received this letter and read it to them on the phone and asked them if it was all right for me to sign it or normal procedure for me to sign it. So they had me to read it again and studied it and talked about it. So there was one sentence in there they said they wouldn't like to sign at all with that sentence in it.

Mr. Kohlmeyer: Does our objection as to hearsay continue on this?

The Court: Yes, sir, and I will overrule the objection to that.

Mr. Kohlmeyer: It will be a continuing objection?

The Court: Yes. You may have a continuing objection to it.

A. They said they wouldn't like for me to sign that letter [fol. 378] at all with that one sentence in it and said, in

fact, all the letter was objectionable, that they wouldn't like for me to sign it at all, but I could go ahead and sign it with that one sentence if it was stricken out, and said even though the rest of the letter— "We don't like it; it's been proven that it's not legal by a prior case in court: that it's not a legal document, but if they insist on you signing it, it will be all right to go ahead but we don't like it, but you can sign the rest of it." So I called Mr. Apgar and told him I couldn't sign it at all with that one sentence in it; that I would sign it if they would strike that sentence out. So he said, "Well, we'll re-write the letter verbatim just leaving out that sentence." And he wanted to know if I would sign it if they would do that. He did; sent me another letter, and I called Mr. Giffin and Stentz and read that letter to them and told them it was exactly the same except that one sentence was left out, and they advised me to go ahead and sign it. That is why I signed it, on their advice, because I felt like I needed some help because I didn't understand it. But I did sign it, not understanding, on their advice.

Q. Was it ever your intent to agree to protect Crescent from the result of Crescent's negligence?

A. No, sir, it was not.

[fol. 379] Q. Was it ever your intent to have Dixilyn's insurance cover Crescent's negligent act?

A. No, sir.

Q. Were you aboard the Julie Ann on the trip down the river from Vicksburg in December of 1957?

A. Yes, sir.

Q. Did you exercise any supervisory control over the navigation of the flotilla?

A Did I— Ask that again, please.

Q. Did you exercise any supervision or control over the navigation of the flotilla?

A. No, sir, I didn't. That's the first time I had ever been on the river. I didn't exercise any—didn't know anything about it.

Q. Do you recall, Mr. Tidwell, when the Julie Ann was turned around with her stern downriver for the final approach to the Natchez Bridge?

A. Yes, sir.

Q. At the time she was turned around for the final approach to the Natchez Bridge, was the Julie Ann brought to a complete stop?

A. No, sir, it never was.

Q. From that point to the bridge, was there any interruption of her movement?

A. Any interruption of her movement?

Q. Was she ever stopped at the point where she was [fol. 380] turned around for a final approach to the bridge?

A. No, sir. No, sir. Never was stopped.

Q. When she was turned around for that final approach to the bridge, had her legs been finally lowered for a passage under the bridge?

A. No, sir.

Q. Did you have any conversation with Captain Brechtel with reference to lowering of the legs after she had been turned around for her final approach to the bridge?

A. Well, Captain Brechtel told me we couldn't lower them until— We had to cross a rock ledge in the river that was a shallow spot and that we couldn't lower the legs until we passed this spot, rock ledge, and then we couldn't lower them to go under the bridge.

Q. How did he happen to tell you that?

A. As we approached, it looked to me like we were getting pretty close and the legs were pretty high, and I asked him, "Why don't we get them down? We're getting pretty close." And he advised me the reason we were waiting was to cross a ledge, and after we crossed it and got the soundings, then we lowered them.

Q. Do you recall when the final lowering of the legs began?

[fol. 381] A. Yes, sir.

Q. I want you to tell the Court whether there was any interruption of the lowering of the legs before she hit the bridge after the final lowering of the legs began.

A. No, sir. Once we started down with them, we never did stop. We started down when we got the word, and we just kept lowering from then on; even after we hit the bridge, we kept lowering.

Q. And you were lowering continually until the time you hit the bridge?

A. That's right.

Q. Where were you as the flotilla approached the bridge?

A. I was on top of the living quarters of the Julie Ann on the barge.

Q. From that position, could you see the three tugs which were face up against the stern of the Julie Ann?

A. Yes, sir.

Q. Could you tell whether their engines were operating?

A. Yes, sir.

Q. How?

A. Well, I could hear them and I could see their stern wash. I could see each one of them had a— They were pushing against us and I could see their stern wash and hear them, and I could see their exhaust smoke.

[fol. 382] Q. What, if anything, did you observe with reference to the Orleans as the flotilla approached the bridge?

A. Well, as we approached the bridge, as I said a while ago, it appeared pretty critical, looked like it was going to be pretty close, and I don't recall exactly what attracted me to the Orleans, but something. I either heard its engine stop or I noticed smoke, or—anyhow, after I looked at it, I noticed that they didn't have any stern wash, that the engine was not running at all.

Q. Was any smoke coming from the stack?

A. No, sir.

Q. What about the other two tugs?

A. They were both still going; the Ouachita and Toltec both were still pushing on it.

Q. As I understand you, there was no evidence of engine movement on the part of the Orleans either from stern wash or smoke or noise?

A. That's right.

Q. What did you do?

A. Well, on the top of the quarters of the Julie Ann, our radio room—where our radio and our controls for lowering the legs and our contact with the tugs, we had the window out of it. You can remove the window. We had a window out so I ran over there and told them to call the [fol. 383] Orleans to get fired up again, that we was ap-

proaching the bridge and it wasn't any time to be shutting the engines down. It was real critical. Looked to me like we was going to hit it, and for them to get back in gear. They told me the Orleans had already advised them that the engine was out of order and they were completely shut down and couldn't run it.

Q. Did that occurrence have any noticeable effect on the movement of the flotilla?

A. Well, there were several people on top of the quarters with me; in fact, quite a few. And I remember specifically commenting myself to someone with me that apparently instead of stopping as we were trying to stop to keep from hitting the bridge, instead of stopping it seemed to me it was accelerating, just gaining speed all the time.

Mr. Watkins: I believe that is all.

Cross-examination.

By Mr. Kohlmeyer:

Q. Mr. Tidwell, what sort of educational background do you have?

A. I have a bachelor of science degree in petroleum engineering.

Q. What school?

[fol. 384] A. Oklahoma. University of Oklahoma.

Q. I recognize you have no legal training. You don't, do you?

A. No, sir.

Q. You signed the letter of December 23rd from Crescent to Dixilyn on authority of Mr. Brigham?

A. Well, I signed it on my authority. I don't recall if I was in contact with Mr. Brigham or not. He was out of town. I don't even recall where he was, and I don't even know if I particularly had his authority or not. I have his authority at any time to sign anything.

Q. When you sign something for Dixilyn, the company adopts your signature and you are authorized to sign?

A. That's right.

Q. And you were authorized to sign this agreement on behalf of the corporation?

A. That's right.

Q. There is no question about that?

A. No.

Q. No one ever told you afterward you had no right to sign it?

A. No.

Q. The company never disclaimed this agreement?

A. No.

Q. And disavowed to it?

[fol. 385] A. No, sir. To my knowledge, not as far as I know.

Q. And if they had, you would have known it, wouldn't you, in your position?

A. I would think so.

Q. Now, after you got this letter, the first of the two letters of December 23rd, isn't it a fact that you advised Mr. Apgar or Mr. Stentz to get in direct contact with each other and to discuss the matter over the phone or personally?

A. I don't recall. It seems to me that maybe I did, or maybe they did get in contact. I don't know if I advised them to or they advised me it would be best. I don't recall. That's been an awful long time ago and I just don't recall.

Q. Are you familiar with insurance?

A. Well, I understand—

Q. —Marine insurance?

A. Marine?

Q. Marine insurance.

A. No, sir.

Q. You don't know anything about the insurance on this rig?

A. I know we have insurance. That's about the extent of it.

Q. Do you know what the coverage of that insurance is?

A. Yes, sir.

[fol. 386] Q. Would it cover a third party towing one of these rigs?

Mr. Watkins: I think that calls for a legal interpretation.

The Court: Sustain the objection.

Q. Now, Mr. Tidwell, you recall the meeting that was held before these letters were written, at your office, where Mr. Boring and Mr. Stentz and Mr. Giffin and Mr. Apgar and Mr. Smith were in your office in New Orleans?

A. No, sir, I don't recall such a meeting with Mr. Boring present. Mr. Boring was not present at that meeting.

Q. You recall no such meeting at all?

A. I recall a meeting where Mr. Giffin and Mr. Stentz and I recall a meeting, but Mr. Boring wasn't present.

Q. Who was there on behalf of Dixilyn?

A. I was.

Q. Who else?

A. No one.

Q. Who was at the meeting other than you, Mr. Apgar, Mr. Smith, Mr. Stentz and Mr. Giffin? Is that the meeting you refer to?

A. That's the one I'm referring to.

[fol. 387] Q. That was the only meeting you had with the Crescent representatives?

A. Well, you know, they come by and visit and—

Q. I'm not talking about a casual meeting; I'm talking about a meeting to effect this contract.

A. Yes, sir, we had a meeting, Mr. Apgar and some other person from Crescent Towing. I don't recall who it was. In fact, when I wrote the notes, I didn't write his name down, but I made the notes of the meeting, and it was Mr. Apgar and myself and some other person from Crescent Towing, Mr. Giffin, Mr. Stentz, and Mr. Charlie Wood and, I believe, Mr. Harry Blakely was there. I would have to check my notes.

Q. Do you have your notes with you?

A. No, sir, I don't.

Q. Are they in Vicksburg?

A. No, sir.

Q. Did you know you were coming up here to testify in this case?

A. Yes, sir.

Q. Are those notes available in New Orleans?

A. Yes, sir. Now, I don't know if they are in Vicksburg or not. I turned them over to the attorneys.

Mr. Kohlmeyer: May I ask if those notes are present [fol. 388] in court?

Mr. Watkins: I don't know if we have those notes or not.

A. I don't have my penciled notes. Now, this was a penciled report I wrote later from my notes.

Q. Those notes were made contemporaneously or immediately following the conference?

A. In fact, during the conference.

Q. And you have the letter you wrote from the notes here in the courtroom, or was that given to your attorneys too?

A. I don't know.

Q. You have it in the courtroom?

A. I don't know. I don't have anything. I don't know if it was—

Q. Did you give it to your attorneys.

A. I'm not sure. I don't know what all they got.

Q. Do you have any contemporaneous memoranda or letters from 1957 relative to this transaction in Vicksburg? I don't mean you. Does it exist in Vicksburg?

A. Well, sir, I don't know what all they brought.

Q. Who brought?

A. —Yes, I have a file.

Q. Where is your file?

A. I say I don't have one. My attorneys have it.

[fol. 389] Q. You gave your file to the attorneys?

A. Yes, sir.

Q. And if that letter is in the file, then it is here in the courtroom? Is that right? If they got the file?

A. If they brought it.

Mr. Kohlmeyer: We call for the production of the correspondence and the notes—

The Court: —You have sufficiently identified the notes. If they have them, I will require them to give them to you.

Mr. Watkins: We are trying to find them.

The Witness: As I said, this was written a year or so later from my notes.

The Court: What letter do you refer to? Do you know what letter you are referring to as having been written from the notes?

The Witness: It wasn't a letter; just a memorandum, inter-company memo.

The Court: In other words, you were not referring to the December 19th or December 23rd letter? That was not written from your notes?

The Witness: No, sir.

Q. Mr. Tidwell, while they are looking for that, we will [fol. 390] go on a little bit further. After you got the letter of December 19th, did you discuss that letter with Mr. Stentz and Mr. Giffin?

A. I don't recall discussing it with them. I just don't recall.

Q. How did Mr. Stentz and Mr. Giffin get in your office?

A. They just sat in on this meeting.

Q. Did you invite them?

A. I think they probably invited themselves.

Q. Did they know the meeting was set up?

A. Yes, sir.

Q. How did they know it?

A. I don't know, but they had to know.

Q. Now, Mr. Tidwell, we are sitting here in court trying to get to the bottom of a situation, and I don't know if it has any bottom. These men didn't just walk into your office casually and go into a meeting and talk about a matter they were interested in.

A. That is why I say they must have known there was a meeting.

Q. And they didn't know it from Crescent?

Mr. Watkins: We are willing to stipulate they did not get any information about the meeting or the contract from [fol. 391] Crescent. Any information they got came from Dixilyn.

Q. Did you invite them to the meeting?

A. I don't recall. In fact, I think they called the meeting, being I got to thinking about it. I think they called for the meeting.

Q. Did they act as advisors to Dixilyn as regards the making of this contract? I'm speaking of Stentz and Giffin.

A. Well, in respect to the letter I signed, they advised me on that.

Q. Had you had the letter yet?

A. No, sir.

Q. What were they doing at the meeting? Isn't it a fact Mr. Stentz, Mr. Giffin and Mr. Wood and Mr. Blakely were there as advisors to Dixilyn for the purpose of advising Dixilyn about the handling of the towage of the Julie Ann from Vicksburg to New Orleans? Isn't that a fact?

A. Here's what I knew about it. I don't know what you are getting around to—

Q. Never mind what I'm getting around to. Just answer the question.

A. They asked for a meeting.

Q. Who?

A. Mr. Charlie Wood specifically asked for the meeting.

[fol. 392] Q. Whom did he ask?

A. Asked me, I suppose. I don't recall. That's two and a half years ago.

Q. How do you recall he asked for the meeting?

A. Because I didn't know enough about it to call a meeting.

Q. Did he ask you to hold a meeting?

A. Someone asked for a meeting, and I don't recall who did, but I think it was Mr. Wood asked for a meeting to discuss the rigs that would be used and who would be master of the tow, that he wanted to know.

Q. Why would he want to know?

A. To be perfectly frank, I don't know. He's an accident or loss prevention marine surveyor.

Q. Was he on Dixilyn's payroll?

A. No, sir.

Q. Did you know he was representing your underwriters?

A. At the time I didn't know who he represented.

Q. Now, Mr. Tidwell, really, do you sit up there and tell us some stranger called you to ask for intimate details of your business and how you were handling it, and you called a meeting and disclosed all that without knowing who he is?

A. Yes, sir.

Q. That is true?

A. For this reason: I had very recently—in fact, in [fol. 393] October, I was transferred from West Texas to New Orleans as district manager. I had never had any

marine experience whatsoever. I didn't know the first thing about making a towing contract. I never had even seen a towboat except at a distance. I didn't know the first detail; didn't even know who had our insurance, but I did know that Mr. Wood and Mr. Blakely, the Charlie Wood Company, had been interested in the Julie Ann during construction and had been going to Vicksburg and checking it out, and that they were marine surveyors and—not even knowing what a marine surveyor was—but if they asked me for a meeting, I would have been most happy to call it, which I did, and I didn't know their connection whatsoever with my company. I certainly did that.

Q. You know nothing about operating a drilling rig?

A. I know a lot about operating a drilling rig.

Q. Excuse me. A submersible rig such as the Julie Ann. The operation of it, navigation, and the machinery on it, as of this time you didn't know anything about, did you? I don't mean drilling. I know you knew how to drill.

A. I knew the legs went up and down, but at that time I knew nothing of the operation.

Q. You didn't know how to operate those legs up and down?

[fol. 394] A. Well, yes, I did. I knew you pushed three buttons, but that's all.

Q. You didn't know how they activated the descent?

A. No, I hadn't ever seen a rig but one time while it was under construction. It was out of my area.

Q. Isn't it a fact you had Wood and Blakely and Stentz and Giffin in these meetings with Crescent relative to this contract and in these discussions relative to the contract as technical advisors to Dixilyn?

A. Well, sir, as I said, I didn't know at the time what their position was, and I didn't know what my position was relative to them. I didn't really know. I accepted some of their advice, so I suppose I could say I had them as advisors.

Q. You did rely on their advice, didn't you?

A. Yes, sir.

Q. Fine. Now, when you got this letter of the 19th, you called Stentz? Correct?

A. Giffin or Stentz.

Q. Giffin or Stentz?

A. Yes, sir.

Q. And you discussed the letter?

A. No, not the 19th.

Q. What did you do when you got the letter of the 19th?

A. I didn't do anything.

Q. Why, if you know, was the letter of the 23rd written?

[fol. 395] A. I don't know why it was written.

Q. You never asked for an additional letter, for a change in the contract that was submitted, the clause that was submitted?

A. I don't understand what you mean. I don't believe I asked. I may have. I don't recall, but I may have asked on someone's advice, but I don't recall.

Q. If you did ask, then you asked on either the advice of Stentz or Giffin? Correct?

A. Correct.

Q. Then you got the first of the two letters of the 23rd?

A. Yes, sir.

Q. And you talked to Stentz about the letter and read it to him a couple of times?

A. Giffin or Stentz.

Q. And either you got directly in touch with Apgar or Apgar got in touch with Stentz after you talked to him, or Stentz called him. In any event, the substitute letter was written. Is that correct?

A. Correct. I don't recall who got in contact with who, but I did get a substitute letter.

Q. State what your conversation was with Stentz or Giffin after you received the first of the December 23rd letters.

A. Would you repeat that?

Q. What was your conversation, if any, between you and [fol. 396] Stentz or Giffin after you got the first of the December 23rd letters?

A. Well, I called them and read it to them on the phone a couple of times.

Q. Correct.

A. And they told me—I don't recall the particular words, but they said, "Read back a certain sentence." And I read it back and they said, "We don't like that sentence at all. I just wouldn't like for you to sign it at all with

that in there." And said, "The rest of it is what is called or is a take-off or similar to a tower's release clause, which has been proven in court as illegal, and we don't like it; it's objectionable; but if they insist on you signing it, we would advise you it would be all right for you to go ahead and sign it because it could not be binding."

Q. They told you it was not binding?

A. That it was not legal.

Q. Not legal?

A. It had been proven in court that it was not.

Q. They didn't tell you anything about the first clause they felt objectionable?

A. They didn't tell me why.

Q. They didn't tell you that was illegal?

A. Didn't tell me why it was objectionable.

[fol. 397] Q. But you did sign the second letter with the clause eliminated that they objected to?

A. Yes, sir.

Q. And when you did that, you were authorized by Dixilyn so to do?

A. Yes, sir.

Q. Now, Mr. Tidwell, I ask you to refer then to this letter which reads, "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liabil y for account of your underwriters . . . " That is the letter you signed. Were you authorized by your underwriters to sign that letter?

A. I don't recall what that letter said.

Q. You sent it, didn't you?

A. Yes, sir.

Q. Well, suppose you look at the letter, and then possibly you can answer my question. The second paragraph, just the first three lines. (Hands to witness.)

A. Now then, ask me the question again.

Q. That says, does it not, that Dixilyn was authorized to release and relieve Crescent for account of the underwriters from any liability on this towage movement? Does it not?

A. "From any liability for account of your underwriters and that any damage claims urged by third parties as [fol. 398] well as any claim which may be urged by virtue

of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters." That's what it says.

Q. And it says you were authorized to do that for account of your underwriters, doesn't it?

A. Authorized to do this "for account of your underwriters."

Q. It says that?

A. Yes, sir.

Q. Were you authorized?

A. I think so.

Q. You can't just tell me you think so.

A. Well, if you don't know, you have to.

Q. Were you authorized to do it?

A. I thought so.

Q. Why did you think so?

A. Because Mr. Giffin and Mr. Stentz advised me it would be all right to sign it.

Q. Well, then, the answer is yes, isn't it? They authorized you to sign this letter and authorized you to say what you said in the letter? That is correct, isn't it?

A. Yes, sir.

Q. So you had authority both from the underwriters and Dixilyn, didn't you, to sign the letter?

Mr. Watkins: He is talking about authority from Giffin [fol. 399] and Stentz. That is Southern Marine and Aviation and not any other underwriters involved in the case. I think he ought to limit the question to one instead of referring to underwriters generally.

Mr. Kohlmeyer: That's the only underwriters we know of at this time.

Mr. Watkins: Counsel, you introduced the insurance policies.

The Court: You say "at this time." Back in 1957. I think I will sustain the objection to that for this reason: You are asking questions of law. Sometimes whether a fellow is authorized or not is a close question of law. You brought out the facts as to whom he had the conversations with, so if he was authorized under those facts, yes; if he was not, then he wasn't. So I will sustain the objection

on that ground which I raise myself. You brought out all the facts yourself and who the folks are.

Mr. Kohlmeyer continues:

Q. You knew, of course, Giffin and Stentz were the two bosses at Southern Aviation and Marine?

A. I understood one of them was, and the other vice-president.

[fol. 400] Q. Now, moving on, that letter says and you knew that it said that Crescent was not responsible for damages to third parties in the course of the towage. You understood that from the letter or from the words of the letter?

A. Well, it appeared as such, yes.

Q. And the reason that you were willing to go along, I believe you said, was because they told you that was illegal? Is that right?

A. Well, I may have used that term "illegal" wrong there in legal terminology. They told me it was not a binding document.

The Court: Mr. Kohlmeyer, I think you have fully covered that phase of it many times. I don't want to cut you short and if you are leading up to something else, go ahead, but he has answered that several times.

Mr. Kohlmeyer: Yes, sir.

Q. Was the insurance of Dixilyn on this barge disclosed to Crescent as being placed with three different companies or groups of underwriters?

A. Yes, sir.

Q. When?

A. At that meeting.

Q. Which meeting?

[fol. 401] A. The meeting when Mr. Apgar and one other person from Crescent and Mr. Giffin and Mr. Stentz and Mr. Charlie Wood and Mr. Harry Blakely.

Q. That was disclosed?

A. Yes, sir.

Q. Was the type of cover disclosed?

A. I don't think so. The reason I say it was disclosed, can I go ahead and tell you why?

Q. Sure.

A. Because I called Fort Worth. I called Texas Employers' Insurance Company at Midland and at Fort Worth and Employers' Casualty at New Orleans, with everyone present. I made these calls and I talked to Mr. Brantz at Fort Worth and advised everybody that we had twenty-five thousand dollars coverage by Employers' Casualty and a million dollars by somebody else. Anyhow, I told them —Swett and Crawford—and we acquired three million dollars additional through Southern Marine and Aviation, and it all went right on in the meeting, all the phone calls, with everyone present.

Q. Who was in charge of the movement of the rig from Vicksburg to New Orleans, as far as Dixilyn was concerned?

A. Well, technigally, I was. I was the superior.

Q. Who gave the order to move the rig from Vicksburg? [fol. 402] A. Well, I don't know that anyone gave the order. I suppose I did or my company did. We received it, and I don't know that we gave any specific orders. We just moved it.

Q. Crescent wasn't there when it started, was it?

Mr. Watkins: We object to that. It's a conclusion. There were two tugs of Crescent present.

The Court: Sustain the objection to his conclusion. I'll let you ask him to provide names.

Q. Was there any representative of Crescent Towing and Salvage present at the time that the rig left LeTourneau yards in Vicksburg?

A. Well, I don't know any names. They had a tug.

Q. What tug?

A. I don't know whether it was or not.

Q. The tug didn't meet the rig until you were out in the middle of the river some distance from LeTourneau, did it?

A. That's right.

Q. Who was in charge of the movement, the navigation of the flotilla down the river from Vicksburg prior to the time the tug Orleans met you?

A. I don't recall the gentleman's name. It was a pilot from the tug Ouachita. I say "pilot." I assume he was a

[fol. 403] pilot. Anyhow, he was a river pilot or river captain that came aboard the Julie Ann as master of the tow or pilot of the tow. I don't know what you call him.

Q. And someone from your organization said, "Let's go," and so you left? Is that right?

A. That's right.

Q. Who made the tow ready for departure by putting the steel bar across the keyway?

A. LeTourneau did that during construction; it's been there all the time.

Q. On whose orders? Do you know?

A. No, I don't. It was just part of the contract to build the rig to build the towing bar in it. It was already in there, already installed beforehand. Part of the construction, I mean.

Q. When the flotilla left there was no untoward incident until the following day? In other words, it was a routine voyage down to Rifle Point and the tying up for the night, wasn't it?

A. I don't recall any—

Q. Well, let's drop that and get to the next day then. When you were approaching the bridge where the accident occurred, was anyone standing at the legs reading the draft marks?

A. Yes, sir.

[fol. 404] Q. Who?

A. Employees of Dixilyn, people that I had stationed there.

Q. Did you hear them calling the draft marks off?

A. Yes, sir.

Q. Did they call fifty-five feet on all three legs?

A. No, sir. I don't recall what the specific drafts were, but two of them called one thing and another one called another thing.

Q. What did the two call?

A. I don't recall.

Q. Did they call the same thing?

A. Very close. I don't recall how much.

Q. Isn't it a fact the draft marks were misread at one time during this period?

A. Yes, sir.

Q. When was that?

A. Just before we got to the bridge.

Q. How far away from the bridge?

A. I wouldn't have any idea. Pretty close.

Q. Very close, wasn't it?

A. Pretty close, yes, sir.

Q. You don't know how far?

A. No. It would just be a guess.

Q. Isn't it a fact that someone read the draft mark on the starboard leg as being fifty-five feet and then discovered that it was only forty-five feet?

[fol. 405] A. Oh, no, sir.

Q. That is not true?

A. No, sir.

Q. What is the fact?

A. Well, the fact is, you see, we have these draft marks on the legs and I had them to read the draft mark so I could calculate how much was up in the air, knowing the distance from the water to the bridge, so I could know when we had enough.

Q. What distance was that?

A. I don't recall.

Q. Go ahead.

A. So the mistake was not made on the starboard leg; it was made on the bow leg, which was upriver, the last one to get to the bridge.

Q. That is the helicopter platform?

A. The helicopter platform. So they were calling the stern legs as a certain draft, and I merely transported it to so much in the air. I made it around one leg to the other to kind of keep track. When I got to the bow leg, he called out a draft, and if his draft would have been correct, the bow leg would have been ten feet higher than it actually was. We thought it was sticking up ten feet higher than it actually was, and the starboard and port leg, they were correct on those, to the best of my knowledge.

[fol. 406] Q. What was the draft? Do you know?

A. I don't recall. I sure don't.

Q. But the leg that was too high didn't hit the bridge?

A. No. As it turned out, the boy had made a mistake, and it was ten feet lower than the draft he gave. So it didn't hit the bridge.

Q. So the mistake was in favor of the bridge?

A. That's correct. If he had been correct, ten feet of the bow leg would have hit.

Q. You understand this is a very important point in this case, don't you?

A. Yes, sir.

Q. And you are quite positive of what you have just said, that no mistake was made on the port or starboard legs, but only on the helicopter platform leg? You are positive of that?

A. Well, now, when I say no mistake was made, I never was conscious of any mistake. I'm positive I always felt sure—In fact, I felt sure they were all right until the time, but I never did know of any mistake at all on the starboard and port legs. No, sir, I sure didn't.

Q. And you don't know what depths those legs were supposed to be lowered to?

A. Well, at the time I did, but I don't recall.

Q. And you don't know what clearance you planned to [fol. 407] pass under the bridge on?

A. I believe we planned to have it ten feet below the bridge.

Q. Ten feet below the bridge?

A. That's an awful long time ago, but I believe we did plan to get it ten feet below the bridge.

Q. Didn't you know you were going to testify in this case?

A. Yes, sir.

Q. Haven't you discussed this matter with your counsel over the past day or two?

A. Yes, sir.

Q. And you still don't recall and haven't gotten your recollection refreshed about the footage?

A. Sir, I can't recall. If I can't recall, I just can't. I didn't make any notes of it, and I didn't attempt to recall it.

Q. Suppose I told you that Mr. Hughes would testify that it was the starboard leg that was misread, and it was misread against the rig and in favor of collision. Would that refresh your recollection?

Mr. Watkins: We object to that. There is no such testimony from Mr. Hughes, and, second, even if it were in, Mr.

Hughes' testimony could not be confronted to this witness in an effort to change his testimony.

[fol. 408] Mr. Kohlmeyer: I'm not trying to change it; I'm just trying to refresh his recollection. He says he doesn't know.

The Court: I'll sustain the objection for the reason that there is nothing here on which to base the hypothetical question.

The Witness: May I say something?

Mr. Watkins: The Court has sustained the objection.

Mr. Kohlmeyer: Your counsel doesn't want you to say anything.

A. I'll just answer that question in this way: that Mr. Hughes was inside the building operating the legs, and I was the one on the outside of the building taking the readings, and I'll say he was mistaken because I was out there and saw it and did it myself. So if he says one thing and I say another, I would be the one doing it. So that's what I would say if he testified to that.

Q. You were running around the rig from one leg to the other?

A. No, sir, on top of the quarters and calling to men on the legs.

Q. And they would call to you?

A. They would call to me.

[fol. 409] Q. And you would pass the information to Mr. Hughes?

A. Ever so often I'd go in there and say, "We still got so much on stern and so much on—"

Q. And the rig never came to a rest from the time you left Rifle Point until you hit the bridge?

A. Well, after we made our final approach. I don't recall up the river. I don't know where Rifle Point is.

Q. That is where you stayed for the night.

A. When we made our approach to the bridge, it never came to a halt. We tried to. We attempted to.

Q. I don't know what you mean by your approach to the bridge. When did that start? A mile upstream? Two miles? Two hundred yards? What do you mean by your final approach?

A. When we turned the rig around and started backing up to the rig.

Q. From the moment you turned the rig around until the time you struck the bridge, the rig never stopped?

A. Well, we turned it around several times. We turned it around going under the power line the day before. We did turn it around once.

Q. I'm not talking about the day before. I'm trying to talk about your approach to the bridge.

A. I'm trying to refresh my memory. We did stop and turn around with the legs up one time. In fact, we were making a trial to see if they could stop it, and they did stop [fol. 410] it with one towing, the Toltec.

Q. With the legs up?

A. The cans were up.

Q. When you say "cans" what do you mean?

A. The bottom.

Q. All the way?

A. They might have been down some.

Q. When was this?

A. I don't recall.

Q. The morning of the collision?

A. That's what I was mentioning the day before. I don't recall if we did that the day before or—

Q. Is it your testimony that your final approach started its movement downriver from the time you made the final approach to the bridge until it—

A. —No, sir. We tried awful hard to, but we couldn't.

Q. You didn't stop?

A. No, sir.

Q. Is it your testimony that your final aXpproach started at the time the rig was turned around, headed upstream, and then allowed to float down? Is that the final approach you refer to as the last time?

A. Well, I think so, yes, sir. To the best of my memory. That morning we may have gone all the way turned around. I don't recall.

Q. Where were you standing on the rig, did you say?

[fol. 411] A. On top of the quarters, living quarters.

Q. Point here to the top of the living quarters for me.

A. All on top of this building right here. (Indicating.)

The Court: At this time we'll take a ten minute recess.

(Whereupon the hearing was recessed for ten minutes.)

After Recess

Mr. Kohlmeyer continues:

Q. Mr. Tidwell, will you please put on Dixilyn's Exhibit 2 an "X" on the area on which you were standing at the time you have just described?

A. Well, I moved around. I went all over the top of these quarters.

Q. I understand.

A. It can't be just a simple "X".

Q. I understand, but I want the area.

A. All this area here. (Indicating and marking.)

Q. You have shaded the area you mean. And on this color transparency, which is not in the record, it is the area on top of the house marked with the word "Dixilyn." Is that correct?

A. That's correct.

[fol. 412] Q. Now, from that position you were able to see all of the towing vessels?

A. Yes, sir.

Q. The whole of them?

A. Well, of course, there were obstructions between. There are braces. You may not stand in one spot, but you can look around and see.

Q. What kind of smoke did you see coming out of the stacks of the towing vessels?

A. I don't recall.

Q. Was it black, white, or what?

A. I don't recall. I suppose you are referring to a while ago when I said probably smoke I just noticed. You can tell if they are running.

Q. I thought you said you saw smoke coming out?

A. I said that could have attracted me to it. I don't recall what attracted me to the tug, but something attracted me to it and I checked it, and it may have been the smoke or sound or I noticed that there wasn't any propeller wash. I don't know what it was, but something attracted me to the tug, made me take notice of it.

Q. Now, you recall when the barge turned around and headed upstream on this occasion just before going through the bridge? You recall that, of course?

A. Yes, sir.

[fol. 413] Q. What was the position of the legs when the turn was made?

A. They were down some. You know, they told us we had to go down, we had so much draft, and I don't recall how much. The cans were still—they were left about twenty to thirty feet, or something like that. I don't recall, but they weren't up as far as they would go, but not down very far.

Q. In other words, you had a depth of twenty to thirty feet on your legs at the time the barge turned around?

A. Well, that's just a guess. I don't know how much it was, but they were down some from the upper legs.

Q. What is the rate of decline if you are depressing?

A. Well, the manufacture rating is a foot a minute, but I checked it, I guess—oh, numerous times I checked it, and it always checks out the legs move eight feet in five minutes.

Q. Eight feet in five minutes?

A. Yes, sir.

Q. Can they all move at the same time?

A. Yes, sir.

Q. If you hook the generators up in parallel or series, does it make any difference?

A. I don't think we can hook them up in series. They are parallel.

[fol. 414] Q. And all three legs operate at the same time?

A. Yes, sir.

Q. To full efficiency?

A. They can either one at a time or all of them.

Q. With full efficiency if all of them are on?

A. Yes, sir.

Q. How long was it from the time that you turned—or that the rig turned around until the collision, in minutes?

A. I don't have the slightest idea.

Q. You don't know whether it was an hour or fifteen minutes?

A. No, sir, I don't. I sure don't recall.

Q. When you were calling the drafts to Mr. Hughes—Is that correct?

A. Yes, sir.

Q. —Up on that area that you have shaded on Dixilyn's Exhibit 2, there were with you Captain Brechtel and Mr. Wood, were there not?

A. I think they were in and out. I think the majority of the time, I believe, Mr. Wood stayed inside the control room, and I think Captain Brechtel—I don't recall—I believe he was in at the radio. I'm not sure where he was. I believe he was in at the radio.

Q. Who else was in that area with you at that time you [fol. 415] were approaching the bridge? Anyone?

A. Yes, sir.

Q. Who?

A. We had LeTourneau people.

Q. Can you mention any names?

A. No, I don't know any of them, don't recall any of the LeTourneau people at all.

Q. And you don't recall Wood or Brechtel being up there with you the entire time?

A. They may very well have been. I don't recall. I remember one time—I know one time in particular Woods was inside the radio, and I don't recall if anybody else was up there all the time or part of the time. People were coming and going.

Q. Did you call the drafts or did you call the heights over the surface of the water when you were calling to Hughes?

A. I called the height above the surface of the water.

Q. What were those ranges? Do you recall that?

A. No, sir, I sure don't.

Q. How long were the legs?

A. The legs were 143 feet in height.

Q. And you don't remember a single call that you made?

A. No, sir. As I said a while ago, I don't recall the—Of course, I don't recall how many or how much distance was between the water and the bridge, so I just don't [fol. 416] recall.

Q. Well, in letting the legs down, Hughes was relying on your calls? Is that right?

A. Well, I was going to tell him when to stop, yes, sir.

Q. And you don't remember now when you were going to tell him to stop?

A. No, sir. I don't know what draft reading I would tell him to stop. I don't recall.

Q. Would Hughes know that, do you know?

A. He may very well. I don't know if he does or not. I haven't talked to Mr. Hughes at all in a couple of years, so I don't know if he'll recall or not.

Q. Were you present at any time where a discussion took place with Mr. Hughes and/or Mr. Wood and/or Captain Brechtel when it was agreed as to what you would let the legs down to in transiting the bridge?

A. I'm sure I must have been or I wouldn't know when to tell him to stop.

Q. But there was an agreement as to what the draft would be?

A. Yes, sir.

Q. And you don't remember that was fifty-five feet?

A. No, sir, I sure don't. I don't recall what it was.

Q. There was an agreement?

A. There was.—There had to be for me to know, when [fol. 417] to tell him to stop. I don't recall the agreement or—but there had to be one or I wouldn't know when to tell him to stop.

Q. And you never told him to stop on any of the legs?

A. No.

Q. You were still letting them down and had been the entire time from the time you had turned the rig around until the time of the collision?

A. No. We didn't start letting them down until we crossed this rock ledge we were waiting to cross when we started letting them down. We didn't let them down when we first turned around.

Q. Did you give the orders to start?

A. No, sir.

Q. Who gave the orders to start?

A. Brechtel, I believe would be—I don't recall, but Brechtel, he was taking the soundings of the river and so forth.

Q. How was he doing that?

A. There was some boat taking soundings or some boat that had met us there and was taking soundings and relaying them to him.

Q. To Brechtel?

A. I think to Brechtel, yes, sir. I don't recall. I suppose he was the pilot. They weren't relaying them to me.

[fol. 418] Q. I show you here Crescent's Exhibit 1 and ask if you can tell me on that map where the point was when the legs first were started down.

A. No, sir, I couldn't tell you at all. I don't have any idea. I don't even know how to read this.

Q. It is a hydrographic chart of the river in the Natchez area, the bridge being here, as you can see from the marking there, (indicating) and this is downstream.

A. Is this the bank? (Indicating.)

Q. That is the Louisiana shore, and this is the Mississippi shore, and this is the river and those are the draft marks on the hydrographic chart.

A. No, sir, I wouldn't know.

Q. Is there any location on the shore that you can place? Do you recall whether there was a cable crossing, a Learned's Mill, an old ferry landing, or any land mark you can give me that would tell me where you started letting the legs down?

A. No. I remember a ferry landing being pointed out to me, talking about that's where it used to be, but I don't know if we were turning around or turned around or getting ready to turn around. I can't recall any land mark at all.

* * * * * * *

[fol. 585]

IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed December 13, 1960

The Libellants, on December 22, 1958, filed their libel in the District Court, seeking to recover damages in the amount of $41,363.24, which they had sustained when their bridge across the Mississippi River, located between Natchez and Vidalia had been struck by the off-shore drilling barge, Julie Ann. The accident occurred December 27, 1957. Libellants averred that the Defendants, Dixilyn

Drilling Corporation and Crescent Towing & Salvage Company, Inc., were guilty of negligence that proximately caused the damages to the bridge. In March, 1959 Dixilyn Drilling Corporation, hereinafter referred to as Dixilyn, filed its answer denying negligence on its part, but admitted it had employees on board the rig who were in charge of raising and lowering the legs that will hereinafter be more particularly described, but denied the failure to lower the legs was any negligence on the part of Dixilyn. It averred that the fault was all on Crescent and that Crescent did not have sufficient power to stop movement of the off-shore drilling rig when it became apparent that the same could not pass under the bridge without one of its vertical legs colliding with the bridge, and further averred that Crescent failed to give the signal it should have given in time to lower the legs. In March, 1959 Crescent filed its answer and denied any negligence on its [fol. 586] part and averred that the collision was due to the negligence of Dixilyn; averred that the rig was fully manned and controlled by a crew of specialists during the trip down the river; averred that Crescent did not have dominion or control over the maneuvering of the barge or the legs thereof and that the fault was entirely due to the crew of the Dixilyn. At the same time Crescent filed a petition under Rule 56 of Admiralty. This petition was based on the contract between the parties for the performance of the service of towage. It attached thereto as exhibits two letters, one dated December 19 and one dated December 23, 1957, which it alleged constituted the agreement. The petition further alleged that under the terms of the contract Dixilyn had agreed (1) to indemnify Crescent for all damages which might arise out of the movement, including claims of third parties; and (2) to procure full insurance protection at its own expense against all risks, including damage to any bridge or structure, and such insurance to inure to the benefit of Crescent as well. Dixilyn answered the petition and denied that it had agreed to the indemnity provisions of the contract or to the provisions relative to the insurance, and denied that the Dixilyn crew had anything to do with the movement of the legs other than to raise or lower them as directed by the em-

ployees of Crescent; denied that its crew was in charge of the timing and mechanics of raising and lowering the [fol. 587] legs or that there was any error on its part in reading or reporting the draft marks of the legs; and denied the interpretation that was placed on the contract by Crescent. On April 21, 1959 Libellants answered the petition under Rule 56 of Admiralty and averred that one or both of the Defendants were liable. After several pretrials the Defendants stipulated that the Libellants were entitled to a judgment for the damages to the bridge against either one or both of the Defendants. In March of 1960 the case came on for trial on its merits with reference to the contest between the Defendants as to which one was liable.

The controversy grew out of a contract between Crescent and Dixilyn under the terms of which Crescent contracted to tow down the Mississippi River from Vicksburg to New Orleans, Louisiana a large off-shore drilling barge or rig named the JULIE ANN. It left Vicksburg, Mississippi on December 26, 1957 and as it undertook to pass under the bridge which crosses the Mississippi River at Natchez one of the legs on the rig had not been sufficiently lowered to pass under the bridge and it struck the bridge, doing damage to the amount of $41,363.24. This rig was gigantic in structure. She was 194 feet long, 152 feet wide and 20 feet deep, triangular in shape, with one movable leg at the bow and two at the stern. The legs were 175 feet long, with open truss steel frame construction. The lower ends contained pontoons or spud tanks 35 feet in [fol. 588] diameter and 35 feet in overall height. The legs provided a tripod on which the platform could be raised or lowered at the rate of approximately one foot per minute. The draft of the hull was 13 feet. Beyond the main deck was a machinery deck containing a complex lot of equipment and tanks necessary for power service and oil well drilling operations. On the main deck were located draw works, pipe racks, two revolving deck cranes, three anchor wenches and 2-story living quarters, atop which was a control tower. The rig was a complete unit. The living quarters were spacious, affording accommodations for 45 men, with year-round temperature control.

The Defendant Crescent is a towing company, engaged in harbor, off-shore and ocean towing and tug work, and sometime in November of 1957 Crescent sought the business of towing the rig down the Mississippi River ultimately to its off-shore location. This solicitation was in the form of a letter dated December 18, 1957 from E. J. Pic, Jr., operating manager of Crescent, to Mr. Pickering of Dixilyn. Sometime between December 16 and 18, 1957 a meeting was held in the New Orleans office of Dixilyn, at which meeting there were present: M. O. Boring, Jr., President of Dixilyn; Russell Tidwell, a petroleum engineer for Dixilyn; Charles D. Wood of Charles D. Wood Company, a marine surveyor representing Southern Marine and Aviation Underwriters Insurance, one of the excess coverage [fol. 589] carriers for Dixilyn; H. W. Blakely of Charles D. Wood Company, a marine surveyor of Southern Marine and Aviation Underwriters, Inc.; Warren C. Apgar, Vice President of Crescent; and William S. Smith, Jr., also a Vice President of Crescent. The problem of transporting the JULIE ANN from Vicksburg to New Orleans was discussed, and particularly the size of the rig, the length of the legs, the current, and the size and number of the tow boats that were to be used in the towage of the rig downstream. After various discussions it was found that John J. *Bechtel*, a Crescent employee and experienced river man and tugboat operator, engaged by Crescent and regularly employed by them, could be furnished, and Crescent agreed to place Captain John J. *Bechtel* in charge on its behalf before undertaking to tow the rig to its point of destination; that he would be in command of the tug and all tows, and it was further agreed that Dixilyn would have an experienced man on the rig who would be in charge of lowering the legs of the rig when he was notified by Captain *Bechtel* that the legs should be lowered. At this meeting it was discussed as to the length of the legs that should be left off in order to reduce the force of the current on the rig and in the discussion the length of 60 feet was considered, but finally Mr. Brigham, who represented Dixilyn, advised that 30 feet already had been left off the legs and ultimately Crescent agreed that 30 feet left [fol. 590] off would be sufficient. Apgar, representing Cres-

cent, suggested that Crescent would require a clause in the towing agreement releasing Crescent from any and all liability in connection with the movement. Nothing definite was agreed on at this discussion, other than that Crescent would undertake the towage and would place in charge of it Captain *Bechtel*. The question of a clause in the towage agreement releasing Crescent of all liability was not determined at this meeting, but finally was agreed upon by correspondence after some negotiation and elimination of oral demands that were made by Crescent and the agreement ultimately was reduced to writing, as is shown by letters hereinafter to be referred to.

After that meeting another one was held on December 18 and 20, 1957 in the offices of Dixilyn, where representatives of each party were present, as well as representatives of Southern Marine & Aviation Underwriters. However, these representatives of the Underwriters were there simply as consultants and had no authority to bind anyone, and at this meeting the nature of the release clause was discussed, but no definite agreement reached. Griffin and Stentz requested Apgar to submit the type of release clause desired by Crescent and on December 19 Apgar wrote Dixilyn, to which was attached the standard towage release clause used by Crescent. Dixilyn declined to execute that and requested Apgar to submit another [fol. 591] type. Brigham, who represented Dixilyn, was not present when it arrived, so Tidwell, an authorized representative of Dixilyn, received it and upon its receipt called Griffin and Stentz of Southern Marine for their comments, and after talking to them declined to accept it, but asked that Apgar submit another clause for their approval. On December 23, 1957 Apgar wrote a letter setting out what they desired and this was received by Tidwell, who did not understand the full meaning of the letter and so again he called Giffin and Stentz and was advised by Giffin and Stentz that the letter was objectionable because the first sentence of the second paragraph was illegal and unenforceable. Tidwell then relayed this information to Apgar, who then called Giffen and Stentz to determine what he could further agree to. Giffen and Stentz told him

they could not agree to that, but for them to submit another letter excluding the objectionable sentence and they would instruct Tidwell to sign it. Apgar then sent a third letter, dated also December 23, and upon its receipt by Tidwell he called Giffen and Stentz for advice. Giffen told him to sign the letter in that form, but that it was illegal and unenforceable, so his signing it would make no difference, and thereupon the second letter of December 23 was signed by Tidwell and copy returned to Crescent. Tidwell then went to Vicksburg to join the JULIE ANN. The important part of the second letter of December 23, [fol. 592] 1957 reads as follows:

"It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liabilities for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters."

The first letter of December 23, 1957 contained this language:

"You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claims which may arise out of the towage of the drilling barge."

This sentence was eliminated and does not constitute a part of the written agreement.

Crescent contends, among other things, that Dixilyn is estopped to deny liability under that agreement because Dixilyn knew that that part of the agreement was void and unenforceable. This contention of estoppel cannot be accepted because Dixilyn did nothing to mislead Crescent. The parties were dealing with each other at arms length and had received advice from their attorneys. The doctrine of estoppel therefore does not apply.

[fol. 593] On December 24 Crescent's tug ORLEANS left the city of New Orleans for Vicksburg with Captain Shirer as pilot and Walter Puckett as relief pilot, Robert

Ricord as engineer, a Mr. Gonzales as relief engineer, and an oiler. Fog delayed their arrival in Vicksburg for the appointed time for departure of the rig. About midnight of Christmas Day the 4,000 h.p. triple screw TOLTEC arrived at the LeTourneau plant in Vicksburg. She was in command of Captain Dellie Clark with Captain E. M. Mathes as pilot on the forward watch. About the same time the 1800 h.p. twin screw OUACHITA, a riverboat from Vicksburg, reported at the LeTourneau plant. She was commanded by Captain W. W. Powell as master and Captain Louis O'Donnell as pilot. The JULIE ANN was located in the river at the LeTourneau yard. Her hull was raised out of the water about 9 feet on her legs. On board were Tidwell, Charles Wood and Wayne B. Hughes, who had been resident engineer for Dixilyn during the construction of the rig and whose duty it was to lower and raise the legs when directed to do so by Captain Brechtel. On board also was Lloyd Cotton, a marine engineer in charge of customer relations between LeTourneau and Dixilyn and who was on board as advisor to Dixilyn only. Also on board were a number of Dixilyn employees and a number of electricians and welders employed by LeTourneau. These LeTourneau employees were doing additional [fol. 594] work as the boat was to be towed down the river; but had no connection with the towing or maneuvering of the flotilla whatsoever. Captain Brechtel was the master and in complete charge of the flotilla and had authority over all of Crescent employees.

About 8:00 A.M. on December 26 the two tugboats made up to the JULIE ANN, the TOLTEC to a steel bar across the drilling slot in the stern of the rig and the OUACHITA to the TOLTEC's port side. Captain Brechtel missed connections and failed to arrive at 8 o'clock on December 26. However, Captain Clark, who is a competent tugboat operator, inquired of Hughes if Dixilyn was ready, received a reply that Dixilyn was ready, and thereupon these tugs started out from Vicksburg with the rig. Captain Brechtel was an experienced operator of tugboats on the river and had towed two other LeTourneau drilling rigs down the river prior to this time. The flotilla had no trouble during the voyage down the river until it anchored for the night

a considerable distance above Natchez. Captain Brechtel knew the river, the currents and the dangerous spots, and it was his judgment upon which all of Crescent relied. He joined the flotilla before they left the next morning from the point where they had anchored for the night. Captain Louis O'Donnell of Crescent rode on top of the JULIE ANN control tower and gave signal instructions to Captain Clark by a telephone communications system rigged between the JULIE ANN and the pilot house on the TOL-[fol. 595] TEC. About 2:00 P.M. the flotilla was joined by the tug ORLEANS, which made up to the starboard side of the TOLTEC.

Down the river about 5¾ miles, upstream from Natchez, an electric power line crosses the river. The lowest part of the line was approximately 108 feet above the surface of the river and the depth of the river at that point was 41 feet. At this point the tow was turned around and headed upstream to test the ability of the towing vessels to stop the rig. The legs were lowered approximately 35 feet and the power supplied by the TOLTEC, the OUACHITA and the ORLEANS were sufficient to hold the tow. The power of the TOLTEC was then reduced to allow the JULIE ANN to drift under the power line with the draft of 35 to 45 feet on her legs. After this maneuver the flotilla was moored for the night at a point known as Rifle Point and it was at this place that Captain Brechtel joined the flotilla. No difficulty was encountered from Vicksburg to this point, but care was exercised in coming under the power lines. Captain Brechtel had come by taxi to Natchez and at Natchez he joined Captain Harry Wilson, who was in charge of the United States Engineers' boat, the ORLEANS, and that boat proceeded to Rifle Point with Brechtel and there Captain Brechtel boarded the flotilla. Captain Wilson had informed Captain Brechtel of the various depths of the channel from a point immediately in [fol. 596] front of the Natchez bridge upstream for a distance of two miles or more. Upon arriving at the flotilla, Brechtel went aboard his tug; the ORLEANS, to assist in mooring and then went on the JULIE ANN. After a discussion of the conditions of the river, depth of the water, the dangers of the currents and the location of the rock

ledge, known only to Captain Brechtel, he (Brechtel) determined that 55 feet draft on the legs would be sufficient to clear the rig through the Natchez bridge. The lowest part of the rig was 142.9 feet above mean sea level and Captain Brechtel determined that there was a channel well in excess of 60 feet in depth, approximately 1000 feet wide, extending from Natchez bridge upstream a distance of more than two miles.

About 7:00 A.M. the flotilla was somewhere in the neighborhood of Learned's Mill, about 1¼ miles above the Natchez bridge. The rig was turned around and headed upstream and the legs were lowered to a draft of 35 feet. At this point a test was made of the holding power of the tugs against the tows and in the opinion of Captain Brechtel, with the legs lowered 35 feet the tugs would hold. No test was made at this point, or at any other point, to determine the holding power of the tugs with the legs lowered to a depth of 55 feet, which was required in order to pass under the bridge. Without making a test to a depth of 55 feet, Captain Brechtel, in charge, permitted the flo- [fol. 597] tilla to drift downstream toward the bridge before giving orders or notice to depress the legs. Captain Brechtel, with his knowledge of the river, knew that there was a submarine cable crossing the river about 2,500 feet above the bridge and about 1,500 or 2,000 feet above it there was a rock ledge that made out from the Mississippi shore. He knew that under the bridge there was a right hand set or right hand draft in the current away from the Mississippi bank toward a bridge pier on the West side of the navigation span. He knew this condition of the current had a tendency to force boats into that pier. Without making any further tests, he maneuvered the flotilla toward the Mississippi bank across the rock ledge, and at no time did he bring the flotilla to a stop after having crossed the ledge *or* give any signal to Hughes when to begin to lower the legs. He failed to stop the flotilla after he crossed the dangerous and hazardous rock ledge for Hughes to lower the legs 55 feet and neglected to give Hughes notice when to begin lowering the legs, as he had agreed to do and upon which assurance Hughes relied; and it was Hughes who discovered for himself that a leg was going to strike the

bridge. As the legs were lowered the power of the current was too great for the tugs even to stop the barge, or even slow it down, until Hughes could lower the legs to the necessary depth. The engine on one of the boats was [fol. 598] defective and not sufficient to put forth its full power, but even if it had put forth its full power, still the power of all the tugs would have been insufficient to hold the boat with the legs lowered to a depth of 55 feet. When it was made apparent to Brechtel that the flotilla would not clear, he ordered all boats full speed ahead, but was unable to stop the flotilla or slow it down in time for the legs to be sufficiently lowered. Brechtel contended that Hughes miscalled the reading of the depth of the legs, but I am unable to find from all the testimony in this case that he relied upon such reading or that he had any reason or justification to rely upon same, as the function of Hughes on the JULIE ANN, and only function in so far as the towage was concerned, was to lower or raise the legs when directed so to do by Brechtel. Hughes knew nothing about maneuvering the flotilla and knew nothing about the currents or the danger spots in the river, but insofar as maneuvering a tow down the river, the flotilla was entirely in charge of Captain Brechtel. The *two* itself had no power, but was controlled entirely by the movements of the tugs and the power afforded by the tugs, all of which were under the command of Captain Brechtel. As the flotilla was proceeding under the bridge and Mr. Hughes discovered that it would probably not pass under the bridge unless the tow was slowed down, he began immediately, as soon as he discovered the perilous situation, to lower the legs as rapidly as could be done. He was [fol. 599] guilty of no negligence or carelessness in failing to begin lowering the legs earlier for the reason that he did not know where the rock ledge was and was depending on Captain Brechtel to advise him when to lower the legs. He continued to lower the legs as rapidly as the power afforded under the mechanism would permit him to do. The mechanism and the construction of the legs provide no way by which the lowering can be speeded.

The JULIE ANN, with ~~all of the drilling~~ equipment and paraphernalia on board, probably weighed several hundreds

of tons and it was known to Crescent that towing her down the river would be a very hazardous undertaking. She was a special craft, requiring special skill, management and control. On the voyage down the river Crescent knew that there were some three or four bridges under which she would have to pass. Crescent knew the location of utility lines and pipes which traversed the river and it could be foreseen, or should have been foreseen that unusual care and caution in the undertaking should be exercised. Not to have seen and anticipated this condition of itself would be negligence on the part of Crescent. The task required an unusual and extraordinary amount of power to safely maneuver it. The obligation rested upon Crescent to navigate the flotilla with reasonable care, depending upon that degree of care commensurate with the hazardousness of the undertaking. The JULIE ANN had [fol 600] no power of its own and no one on board who was expected or, under the contract, required to do any of the maneuvering or perform any other function other than to lower the legs or raise the legs when ordered so to do. Crescent owed the duty to third parties to exercise reasonable care in navigating this flotilla down the river commensurate with the unusual and extraordinary circumstances that confronted it. Captain Brechtel realized that it was a very hazardous undertaking to pass under the bridge and did turn around and place the tugs downstream to the JULIE ANN so as to push against her upstream in order to have more holding power. However, Crescent had neglected to furnish sufficient tugs or sufficiently powerful tugs to control and maneuver the barge and her equipment.

Under all the testimony in this case Crescent was negligent in not furnishing sufficient power to hold the JULIE ANN against the current when its legs were being extended to the required depth of 55 feet. The Crescent had had experience in towing heavy tugs and also had experience in towing two flotillas similar to the one that was being towed on this particular occasion, and it should have known the dangers attendant upon an undertaking like this and should have supplied additional tugs or tugs with more power than the combined power of these tugs. The

tug ORLEANS was unable to exert its full power because [fol. 601] of a defective engine which failed at the crucial moment. In reaching this conclusion I am not taking into consideration the testimony that when they reached the Baton Rouge bridge Crescent supplied an additional tug for the purpose of safely navigating under that bridge. I excluded this from consideration because it is something that happened after the occurrence at the Natchez bridge, but after excluding this testimony I find that Crescent knew or should have known that the power was insufficient. Captain Brechtel, who was in complete charge and control of the flotilla, was also guilty of negligence in not completely stopping the flotilla and lowering the legs to a depth of 55 feet before it reached the Natchez bridge. He knew that the current was running 4 or 5 miles an hour and knew that when the spuds were lowered to 55 feet it would be very difficult to control the flotilla because of the increased power of the current propelling the flotilla downstream and should have taken precautions to have had the legs lowered in ample time to have passed under the bridge safely. He was negligent in not making a test of the holding power of the barges with the legs lowered 55 feet when he was some two or three miles upstream from the bridge. He was negligent in his failure to notify Hughes earlier when to lower the legs and in not stopping immediately after he crossed the rock ledge in order for Hughes to have lowered the legs to a depth of 55 feet. Hughes exercised reasonable care when he began to lower the legs as [fol. 602] soon as he saw and appreciated the danger confronting him and was guilty of no negligence that in any way contributed to the collision.

Under these facts, as a matter of law, the Crescent is liable for all the damages. Many authorities could be cited to sustain this view, but sufficient is the case of The Ames and The Carroll No. 20 and The Edwin Chilton, 66 Fed. (2) 413; The Clarence P. Howland, 16 Fed. (2) 25.

The second question presented by this record for determination is whether or not the Dixilyn agreed to indemnify Crescent for any and all damages that might be suffered by third parties and, as heretofore stated, Crescent relies upon the second letter of December 23. The evidence and corre-

spondence is clear to the effect that Dixilyn declined so to do and declined to execute the towage release clause requested by Crescent. Crescent, of course, knew before the refusal of Dixilyn to execute those documents that Dixilyn did not intend to release Crescent from any liability to third parties due to the negligence of Crescent. In order for one to release the other party for damages due to its own negligence, the contract of indemnity must be clear and definite in its terms that such is the intention. Batson-Cook Co. v. Industrial Steel Erectors, 257 Fed. (2) 410; Standard Oil Co. of Texas v. Wampler, 218 Fed. (2) 768; Bisso v. Island Waterways Corpn., 349 U. S. 85.

[fol. 603] Since the damages to the bridge flowed from the negligence of Crescent, it is clear under the above authorities that Dixilyn did not indemnify or agree to indemnify Crescent by its letter of December 23. Southwestern Sugar & Molasses Co. v. River Terminal Corpn., 360 U. S. 411, is not in conflict with Bisso and in no way overturns the holding in the Bisso case. All the authorities cited by Crescent have been given careful study, but are not applicable to the facts of the present case and it would unduly prolong the length of this opinion to undertake to differentiate them. The authorities that have been cited hereinabove are *conupon* the legal issues presented. The facts as herein stated and the law as herein declared constitute my finding of fact and conclusion of law.

Libelants in the case are entitled to a judgment in the sum of $41,363.24 against the Crescent Towing & Salvage Company, Inc., and the liability of the Crescent Towing & Salvage Company, Inc. is established for that amount. The cross bill of Crescent Towing & Salvage Company will be dismissed.

This, the 5th day of December, 1960.

Sidney C. Mize, United States District Judge.

[fol. 604]

IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed February 6, 1961

This cause having come on for hearing on the pleadings and proof of the respective parties, and the Court having considered the arguments and briefs of the respective proctors, and Crescent Towing & Salvage Company, Inc. and Dixilyn Drilling Corporation having, on April 25, 1960, with the consent and approval of the Court, jointly satisfied the claim of libellants in the total amount of $41,363.24, the said parties having stipulated that they or either one of them were responsible for the damages sustained by the bridge, and that this litigation should continue as to them in order that the Court might find liability as to either or both of them and render a decree accordingly, and the Court having approved such stipulation, and having concluded that the damages suffered by the bridge were caused solely by the fault of Crescent Towing & Salvage Company, Inc., and the Court having rendered a written opinion dated December 5, 1960 which is hereby adopted as its findings of fact and conclusions of law pursuant to Supreme Court Admiralty Rule 46½,

Now Therefore, on motion of Royston, Rayzor and Cook, proctors for respondents, Dixilyn Drilling Corporation, it is

Ordered, Adjudged and Decreed that Dixilyn Drilling Corporation recover of and from Crescent Towing & Sal-
[fol. 605] vage Company, Inc. one half of the amount of the damage suffered by the bridge and paid to libellants, to wit: the sum of $20,681.62; with interest thereon from April 25, 1960, at the rate of five (5) per cent per annum until paid; and it is further

Ordered, Adjudged and Decreed that the petition filed under the 56th Admiralty Rule by Crescent Towing & Salvage Company, Inc. against Dixilyn Drilling Corporation be and the same hereby is dismissed; and it is further

Ordered, Adjudged and Decreed that all costs herein be borne by Crescent Towing & Salvage Company, Inc.

Gulfport, Mississippi, this 4th day of February, 1961.

S. C. Mize, United States District Judge.

Approved as to Form:

C. L. Collins, Proctor for Libellants.

Brunini, Everett, Grantham & Quin; Lemle & Kelleher, By Charles Kohlmeyer, Jr., Proctors for Respondent, Crescent Towing & Salvage Company, Inc.

Watkins & Eager; Royston, Rayzor & Cook, By Thos. H. Watkins, Proctors for Respondent, Dixilyn Drilling Corporation.

Filed and entered OB 1961 pages 20 and 21.

[fol. 625]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

ARGUMENT AND SUBMISSION—January 8, 1962

No. 19148

CRESCENT TOWING & SALVAGE COMPANY

versus

DIXILYN DRILLING CORPORATION

On this day this cause was called, and after argument by Charles Kohlmeyer, Jr., Esq., for appellant, and E. D. Vickery, Esq., for appellee, was submitted to the Court.

[fol. 626]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19148

CRESCENT TOWING & SALVAGE COMPANY, Appellant,
versus
DIXILYN DRILLING CORPORATION, Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

OPINION—Filed May 9, 1962

Before Tuttle, Chief Judge, and Rives and Wisdom, Circuit Judges.

Rives, Circuit Judge: The appellant (Crescent) and the appellee (Dixilyn) were respondents to a libel filed by the Mississippi State Highway Commission, the City of Natchez, and the Highway Department of the State of Louisiana for $41,363.24 damages sustained by the Natchez-Vidalia Bridge when Dixilyn's Julie Ann, an offshore drill-[fol. 627] ing barge, collided with the underside of the bridge. The Julie Ann was being towed down the Mississippi River by Crescent pursuant to its contract with Dixilyn. Crescent and Dixilyn jointly paid the amount of the libelants' claim under a stipulation approved by the court, which provided in part that "the libelees, as between themselves, may litigate to a final conclusion all questions of negligence, liability, contribution, indemnity and ultimate responsibility on the part of each or both of the libelees." After a full trial on the merits, the district court entered a final decree holding Crescent solely at fault and liable to repay to Dixilyn its half of the satisfied claim with interest and costs.[1]

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[1] The opinion of the district court is reported as Mississippi Highway Commission, et al. v. Dixilyn Drilling Corporation, et al., S.D. Miss., 198 F. Supp. 788.

The district court found Crescent at fault for not furnishing enough power to hold the Julie Ann while her legs were lowered sufficiently to clear the underside of the bridge, and that Crescent's Tug Orleans had an engine failure which caused or contributed to the lack of sufficient power. It further found that Crescent's Captain Brechtel was guilty of negligence in failing to make an earlier test of the holding power of the tugs with the legs lowered to the required depth, in not causing the Julie Ann to be brought to a complete stop for the lowering of her legs, and in failing to notify Dixilyn's employee Hughes at an earlier time to start the lowering of the legs. Those findings are vigorously attacked by Crescent as clearly erroneous, and Crescent insists that the collision was caused by a misunderstanding of the Dixilyn personnel aboard Julie Ann as to the operation of her legs, and by their failure properly to call the draft of the legs, thereby leading Captain [fol. 628] Brechtel to the belief that the legs would clear the underside of the bridge.

A review of the district court's findings of fact would confront us with an extremely difficult decision. Instead, we examine first the towage contract between Dixilyn and Crescent. If that contract validly shifted liability for the collision damages to Dixilyn or its insurer, whether or not Crescent was negligent, the fact findings as to negligence are immaterial.

The facts necessary for our consideration of the towage contract are not in substantial dispute, and are restated largely from the briefs of the parties.

The Julie Ann, constructed at the LeTourneau plant at Vicksburg, is a self-contained, submersible type drilling rig. She is 193 feet long, 151 feet wide, and has a displacement of 2500 tons. She is triangular in shape, with legs of open truss steel frame construction 175 feet long set on each corner of the triangle. Approximately 30 feet of the legs had not been installed at the time of the collision. The lower end of each leg consists of spud tanks or feet 35 feet in diameter and about 35 feet in height. The legs provide a tripod on which the hull of the barge can be raised or lowered for drilling operations or for navigational purposes. The legs are operated from a control room situated above

the quarters. They are lowered and retracted by three 60 cycle motors powered by three generators, any one of which is capable of lowering or retracting all three legs simultaneously. The legs are controlled by three levers, all of which can be manipulated so that each leg can be raised or lowered by itself or with one or both of the other legs. [fol. 629] The barge hull itself is 20 feet in depth (from main deck to bottom), and at the time of the collision the hull afloat was drawing approximately 13 feet. Below the main deck is a machinery deck containing a complex of equipment and tanks necessary for drilling operations, including mud tanks, water tanks, and fuel tanks. On the main deck are located draw works, pipe racks and anchor winches. Two story living quarters are situated above the main deck, completely equipped as spacious and comfortable accommodations for 45 men, all air-conditioned and equipped with a modern galley, laundry and recreation lounge. The rig is a complete self-contained unit, capable of drilling in more than 100 feet of water, and includes in her equipment slush pumps, a Schlumberger unit, cement unit, mud lab, water evaporator, mud pits and mixers, jets and guns, six diesel engines, and six electric generators.

The Natchez-Vidalia bridge is a fixed highway bridge over the Mississippi River. The lowest member of the bridge is 142.9 feet above mean sea-level. The surface of the river at the bridge is 17.28 feet above mean sea level at zero on the Natchez gauge. On December 27, 1957, the date of the collision, the Natchez gauge reading was 33.2 feet, so that there was a clearance of 92.4 feet between the surface of the water and the lowest steel on the bottom side of the bridge. The legs of the rig being 143 feet long, they had to be lowered so that at least 51 feet were below the water in order for the rig safely to clear under the bridge. The legs could not be lowered to a depth that would cause them to foul on the river bottom during the approach to the bridge.

The channel of the river (the deepest portion, in which [fol. 630] safe navigation is afforded) approaching the bridge is no less than 1200 feet wide for a substantial distance above it. The contour of the bottom, however, is not level a short distance above the bridge, there being a

ledge or bar less than 55 feet below the surface about 2500 feet above the bridge. Accordingly, until the flotilla passed that point, it was impractical for the legs to have been lowered more than 35 feet. All of these facts were generally known, although, of course, the exact level of the water and the exact conditions which would be encountered on the day that the proposed movement would take place could not be foreseen in advance.

The Julie Ann was scheduled for departure from the builder's yard at Vicksburg for the day after Christmas. Upon hearing that the rig was nearing completion, Crescent solicited the business of towing her to New Orleans, and a letter of solicitation was written. Whether due to this solicitation or otherwise, Dixilyn contacted Crescent in mid-December and suggested a meeting to negotiate a towage contract. A meeting was held at Dixilyn's office in New Orleans in mid-December, attended by Messrs. Tidwell, Boring and Brigham, corporate officers of Dixilyn, Messrs. Wood and Blakely, whose capacity will be hereafter adverted to, and Messrs. Apgar, Smith and Lanman of Crescent. (Mr. Lanman died prior to the trial.) At this meeting, there was a discussion of the general characteristics of the rig and of the timing of the movement, and it was tentatively agreed that Crescent would undertake the towage. Mr. Wood specified that he desired Captain Brechtel to be in charge of the tow, because he had brought one or more rigs down the river on prior occasions. Crescent stated that it proposed to use Captain Brechtel with its small Tug [fol. 631] Orleans and two upriver push boats, the Toltec and the Ouachita, if those vessels were available. The navigation of the flotilla was to be under the command of Crescent's pilot, Captain Brechtel.

The Toltec is a triple screw, 3975 horsepower push boat, 130 feet long by 30 feet wide. It was only six months old at the time of the collision and was the sixth most powerful towboat then running on the Mississippi River. The Ouachita is a twin screw, 1800 horsepower push boat, 90 feet long by 26 feet wide. The Orleans is a single screw tug of 700 horsepower, 100 feet long by 26 feet wide.

The exact role of Mr. Wood does not appear by the evidence. Mr. Wood died before the case was tried, and Mr.

Blakely was not called to testify. Wood, however, was the president and owner of a marine surveying company in New Orleans and had had substantial experience in the engineering and moving of submersible drilling rigs comparable to Julie Ann. Blakely was one of his staff. Evidently they represented Dixilyn in this instance, or Dixilyn's underwriters, for they were at the meeting and participated in the conference and did not represent or have any connection with Crescent.

The district court found that the question of a provision in the towage agreement releasing Crescent of all liability was not determined at that meeting, and that nothing definite was agreed on other than that Crescent would undertake the towage and would place it in charge of Captain Brechtel.

Following the discussion at the meeting, Crescent's vice [fol. 632] president, Mr. Apgar, after consulting with its admiralty counsel, Mr. Kohlmeyer, wrote a letter to Dixilyn as follows:

"December 19, 1957

"Dixilyn Drilling Corp.
Saratoga Building
New Orleans, Louisiana.

"Attention: Mr. H. Brighan
Executive Vice President

"Subj: 'JULIE ANN' From Vicksburg
December 26th, 1957

"Gentlemen:

"We wish to confirm our recent conversation including Mr. M. O. Boring, Jr. and Mr. Mike Smith, in which we discussed the towing of the 'JULIE ANN' from Vicksburg to our Fleet Landing in the New Orleans harbor.

"We understand that the 'JULIE ANN' will be ready to leave Vicksburg the morning of December 26th and we expect to be in Vicksburg ready to move her at that time; we contemplate using two river pushboats (towboats) of substantial horsepower and one

tugboat. For the trip from New Orleans to her offshore location, seagoing tugboats will be used.

[fol. 633] "This tow will be performed by Crescent subject to towage release clause, copy of which is attached and is part of our agreement with you; it being mutually understood and agreed that in consideration of including this clause lower rates prevail. It is also necessary that we (Crescent Towing & Salvage Co., Inc.) be included in the 'JULIE ANN' hull and P & I Insurance coverage and we will appreciate receiving a letter or telegram from your underwriters or brokers to this effect as soon as possible.

"We will continue to keep in touch with your office and know that you will advise us if there is any change in the anticipated readiness of the rig at Vicksburg. We appreciate very much your calling upon us to tow the 'JULIE ANN.'

"Very truly yours,

"CRESCENT TOWING & SALVAGE CO., INC.

"By /s/ Warren C. Apgar
"VICE PRESIDENT.

WCA:m
Encl. (1)

cc - Mr. Pic
Rate files

[fol. 634]

"TOWER'S RELEASE CLAUSE

"All towage will be performed solely at the risk of the craft towed and its cargo, including the risk of negligence of the master, pilot and crew of the towing craft and our employees, agents and representatives, all of whom in respect to the towage shall become and be the servants of the craft towed and its owners and operators; provided that nothing herein contained shall be construed as making the craft towed, its owners or operators, liable or responsible for loss of or damage

to the towing craft or property owned by third parties or for loss of life or personal injury for which the craft towed, its owners or operators, would not otherwise be liable or responsible. Neither we nor the towing craft nor its owners or operators shall be liable, and the craft towed and its owners and operators shall hold us and the towing craft and its owners and operators harmless from any liability, for any loss of or damage to the craft towed and its cargo from any cause whatsoever, including loss or damage caused by negligence of the master, pilot and crew of the towing craft and our employees, agents and representative. We reserve the right to tow all vessels singly or with other craft and to change craft towed from one to another tow as frequently as we may find it convenient to do so. Release of craft to be towed to any vessel owned or used by us for towage shall be conclusive evidence of the acceptance of these conditions."

[fol. 635] The letter was referred by Dixilyn to representatives of the underwriters of the barge, and they were dissatisfied with the "Tower's Release Clause." Mr. Tidwell of Dixilyn called Mr. Apgar of Crescent and told him simply that the clause was not acceptable. Crescent submitted to Dixilyn a second letter, one sentence of which, as indicated, was found objectionable:

"December 23, 1957

"Dixilyn Drilling Corporation
Saratoga Building
New Orleans, Louisiana.

"Gentlemen:

"With further reference to our undertaking to tow your drilling barge JULIE ANN from Vicksburg to our Fleet Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following additional clause shall be included in the contract as part of the consideration for our undertaking the towage:

"~~You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claims which may arise out of the towage of the drilling barge.~~ It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters [fol. 636] and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

"It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims.

"If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.

"Very truly yours,

"Crescent Towing & Salvage Co., Inc.

"By /s/ Warren C. Apgar
"Vice President.

WCA:m

"Approved:

"Dixilyn Drilling Corporation

By: ..... (Not Signed.)"

The circumstances under which the letter was redrafted [fol. 637] with the objectionable clause omitted are thus stated in the testimony of Mr. Tidwell of Dixilyn:

"Well, when I received the letter, I didn't understand it, so I had been advised and been discussing the matter with Mr. Griffin and Mr. Stentz, who are

with Southern Marine and Aviation Underwriters, so I called them when I received this letter and read it to them on the phone and asked them if it was all right for me to sign it or normal procedure for me to sign it. So they had me to read it again and studied it and talked about it. So there was one sentence in there they said they wouldn't like to sign at all with that sentence in it.

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"They said they wouldn't like for me to sign that letter at all with that one sentence in it and said, in fact, all the letter was objectionable, that they wouldn't like for me to sign it at all, but I could go ahead and sign it with that one sentence if it was stricken out, and said even though the rest of the letter—'We don't like it; it's been proven that it's not legal by a prior case in court; that it's not a legal document, but if they insist on you signing it, it will be all right to go ahead but we don't like it, but you can sign the rest of it.' So I called Mr. Apgar and told him I couldn't sign it at all with that one sentence in it; that I would sign it if they would strike that sentence out. So he said, 'Well, we'll re-write the letter verbatim, just leaving out that sentence.' And he wanted to know if I would sign it if they would do that. He did; sent me another [fol. 638] letter, and I called Mr. Griffin and Stentz and read that letter to them and told them it was exactly the same except that one sentence was left out, and they advised me to go ahead and sign it. That is why I signed it, on their advice, because I felt like I needed some help because I didn't understand it. But I did sign it, not understanding, on their advice."

As indicated, the letter was redrafted with the objectionable sentence omitted and, as thus redrafted, was signed by Mr. Apgar for Crescent and by Mr. Tidwell for Dixilyn.[2]

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[2] The consideration and other details were agreed upon verbally.

As to whether the towage contract should be construed to shift to Dixilyn liability for collision damages in any event, including damages due to negligence of Crescent, the district court held:

> "The second question presented by this record for determination is whether or not the Dixilyn agreed to indemnify Crescent for any and all damages that might be suffered by third parties and, as heretofore stated, Crescent relies upon the second letter of December 23. The evidence and correspondence is clear to the effect that Dixilyn declined so to do and declined to execute the towage release clause requested by Crescent. Crescent, of course, knew before the refusal of Dixilyn to execute those documents that Dixilyn did not intend to release Crescent from any liability to third parties due to the negligence of Cres- [fol. 639] cent. In order for one to release the other party for damages due to its own negligence, the contract of indemnity must be clear and definite in its terms that such is the intention . . .
>
> "Since the damages to the bridge flowed from the negligence of Crescent, it is clear under the above authorities that Dixilyn did not indemnify or agree to indemnify Crescent by its letter of December 23."

We have re-stated all of the evidence in the record which would support the district court's finding as to the intent of Dixilyn and as to Crescent's knowledge or notice of that intent. Mr. Tidwell signed the letter contract on behalf of Dixilyn in reliance upon advice from Griffin and Stentz, the underwriter's representatives. That advice was not communicated to Crescent, nor was Crescent advised of the reasoning or intention upon which that advice was based. Actually the advice which Griffin and Stentz gave Tidwell recognized that the meaning and intent of the contract were unfavorable to Dixilyn, but expressed the view that the contract was illegal. "We don't like it; it's been proven that it's not legal by a prior case in court; that it's not a legal document, but if they insist on you signing

it, it will be all right to go ahead but we don't like it, but you can sign the rest of it."

Dixilyn's rejection of the Tower's Release Clause attached to Crescent's letter of December 19 and its rejection of the sentence stricken from Crescent's first letter of December 23 are not necessarily inconsistent with an intent on the part of Dixilyn to release Crescent from any liability to [fol. 640] third parties due to the negligence of Crescent. To the contrary, Dixilyn's refusal to accept the Tower's Release Clause and its insistence on eliminating the sentence from the letter may have been because Dixilyn was not willing to accept liability (1) for fault and negligence on the part of Toltec and Ouachita and their owners, and (2) for collision damages occasioned by Crescent's tug Orleans on its voyage up river to pick up the Julie Ann. If the second letter of December 23 which Dixilyn approved as a part of the agreement of towage expressed plainly and unequivocally that Dixilyn accepted liability for any damage claims of third parties, including those caused by Crescent's negligence, or that Crescent was to have the benefit of Dixilyn's insurance, then the intention so expressed is not inconsistent with Dixilyn's earlier rejections of the Tower's Release Clause and of the sentence stricken from Crescent's first letter of December 23. On the other hand, if that letter is doubtful or ambiguous, then we should place ourselves as nearly as possible in the situation of the parties and should consider the language of the agreement in the light of the previous meeting and correspondence and of all of the attendant and surrounding circumstances. Compare Restatement of Contracts, Sections 230-235.

> "The cardinal rule of interpretation of indemnity contracts is the same as in the case of other types of contracts, namely, the ascertainment of the intention of the parties." Annotation 175 A.L.R. 29.

This Court has held in many cases that the failure of an indemnity contract to refer expressly to negligence evi-

[fol. 641] dences an intention not to indemnify against losses resulting from the indemnitee's negligence.[3]

In two cases where the contract did expressly refer to negligence, it was held to provide indemnity for losses resulting from the indemnitee's negligence.[4]

The more recent case of *Batson Cook Co.* v. *Industrial Steel Erectors*, cited in note 2, *supra*, while holding against the indemnitee, did so both because of failure to use the "talismanic words," and also because of inability "to find the equivalent clear intent in other language of the agreement." 257 F. 2d at 412. Finally, our most recent opinion on the subject expressed the view that the rule requiring that, in order to relieve the indemnitee from liability for losses caused by his own negligence, the contract must contain an express stipulation to that effect "rests on an unsound and dangerous foundation" for reasons well stated by Chief Judge Tuttle:

> "It presumes, first of all, that one party's assumption of liability for losses due to another's negligence is an 'unusual' and 'hazardous' undertaking. We cannot agree. In the light of modern conditions, we perceive little justification for so characterizing the in- [fol. 642] demnitor's obligation. Insurance companies assume this obligation every day, especially in connection with automobile liability policies. And, it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in other business ventures.
>
> "Perhaps more important, even assuming that the burden imposed on the indemnitor is 'unusual' or

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[3] Southern Bell Telephone & Tel. Co. v. Mayor & Aldermen of Meridian, 5 Cir., 1935, 74 F. 2d 983, 986; Halliburton Oil Well Co. v. Paulk, 5 Cir., 1950, 180 F. 2d 79, 84; Martin v. American Optical Co., 5 Cir., 1950, 184 F. 2d 528, 529; W. C. Shepherd Co. v. Royal Indemnity Co., 5 Cir., 1951, 192 F. 2d 710, 717; Standard Oil Co. v. Wampler, 5 Cir., 1955, 218 F. 2d 768, 770; Batson Cook Co. v. Industrial Steel Erectors, 5 Cir., 1958, 257 F. 2d 410, 412, et seq.

[4] Thomas v. Atlantic Coast Line R. Co., 5 Cir., 1953, 201 F. 2d 167, 169; A.G.S. R. Co. v. L&N R. Co., 5 Cir., 1955, 224 F. 2d 1, 4.

'hazardous', the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties. This is a dangerous and unwarranted extension of the judicial function. If a court feels that contract imposes an extraordinary liability on one of the parties, it may, in certain instances, pronounce the contract void as being contrary to public policy. But where, as here, a contract does not violate public policy, we have no authority to achieve the same result by concluding that the parties did not really mean what the unambiguous language of their agreement imports."

Jacksonville Terminal Co. v. *Railway Express Agency, Inc.*, 5 Cir., 1962, 296 F. 2d 256, 262, 263.[5]

[fol. 643] Thus the strict rule so frequently expressed in the cases appears to be giving way somewhat to the modern practice of providing liability insurance, and of bargaining as to which party shall bear the expense of such insurance. According to Mr. Apgar's testimony that expense was large; recently, in towing another drilling rig, Crescent had been charged one per cent of the value of the craft to be towed as a premium to protect for the one trip against liability for any damages. If Crescent had assumed that expense, it would have been reflected in its charge for towage. Actually, the rate charged on the Tug Orleans was $35.00 an hour, which Mr. Apgar testified was the customary charge for a normal operation with the Orleans.[6]

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[5] We recognize that a part of this criticism does not apply to a case of admiralty or maritime jurisdiction in view of the more extensive power of the Supreme Court in such cases. See Gilmore & Black, The Law of Admiralty, Sec. 1-16, pp. 40-42.

[6] Crescent was authorized to contract for the services of the other tugs, the Ouachita and Toltec, at the best rates available, and was not questioned on that part of the transaction.

The letter contract plainly stated that the "additional clause" was "part of the consideration for our undertaking the towage."[7] The contract then provided:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters."

Some liability might have rested on Crescent for unsea- [fol. 644] worthiness not caused by negligence, but the most substantial liability to which Crescent might be subjected was that based on its own real or claimed negligence. If "any claims urged by third parties," as used in the exculpatory sentence, is interpreted not to include claims based on Crescent's negligence, then the provision is deprived of any real meaning.[8]

If Dixilyn had any doubt of Crescent's intention that doubt should be removed by the next paragraph of the letter:

> "It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims."

Why should Crescent be interested in Dixilyn's insurance unless that was meant also to protect Crescent? As to third-party claims, Dixilyn's insurance was to amount to four million dollars. When that agreement is coupled with

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[7] In its letter of December 19, to which the proposed "Tower's Release Clause" was attached, Crescent had stated "it being mutually understood and agreed that in consideration of including this clause lower rates prevail."

[8] The "Tower's Release Clause" attached to Crescent's letter of December 19 had put Dixilyn on notice that Crescent was seeking indemnity against losses resulting from its own negligence.

the agreement in the preceding paragraph "that any damage claims urged by third parties . . . in the course of the towage shall be for your account and account of your underwriters," the conclusion is inescapable that Dixilyn agreed to afford Crescent the benefit of Dixilyn's insurance. There seems little doubt that Griffin and Stentz, representatives of Dixilyn's underwriters, clearly understood Crescent's intent, but chose to rely on their opinion that [fol. 645] ". . . it's been proven that it's not legal by a prior case in court . . ."

The district court having held that the contract was not sufficiently specific to require Dixilyn to indemnify Crescent against third-party claims based on Crescent's negligence, or to bind Dixilyn to afford Crescent the benefit of Dixilyn's liability insurance, did not reach the question of whether such a contract is valid. The "prior case in court" which led Giffen and Stentz to think the contract invalid was, in all probability, *Bisso* v. *Inland Waterways Corporation*, 1955, 349 U. S. 85, or its companion case, *Boston Metals Co.* v. *The Winding Gulf*, 1955, 349 U. S. 122. In those cases the Supreme Court created, or accepted as based upon public policy, a judicial rule in admiralty invalidating contracts releasing towers from all liability for their negligence.[9]

In *Southwestern Sugar & Molasses Co., Inc.* v. *River Terminals Corp.*, 1959, 360 U. S. 411, the Court held that where the exculpatory clause had been filed as part of a tariff with the Interstate Commerce Commission it should not be struck down as a matter of law until the parties had been afforded a reasonable opportunity to obtain the views of the Commission, and stated:

> "The rule of *Bisso*, however applicable where the towboat owner has 'the power to drive hard bargains,' may well call for modification when that power is ef-

[9] Mr. Justice Black delivered the opinion of the Court in *Bisso* with the concurrence of the Chief Justice and of Justices Clark and Minton. Justice Douglas wrote a separate concurring opinion and Justice Frankfurter wrote a full dissenting opinion in which he was joined by Justices Reed and Burton. Justice Harlan did not participate.

[fol. 646] fectively controlled by a persuasive regulatory scheme.

"Further, it may be noted that the clause relied on in this case is by its terms restricted to the situation where shipments are transported to barges furnished by others than the towboat owner. Whatever may be the considerations involved in forbidding a towboat to contract for exemption from liability for negligence in other circumstances, it may be that different considerations apply when the towboat moves barges which are delivered to it loaded, so that it never has an opportunity adequately to inspect them below the waterline, and which, if defective, may create emergency situations where a small degree of negligence can readily lead to very substantial monetary loss. *If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, it may be that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances.*" (Emphasis supplied.)

360 U.S. 418, 419, 420.

Virtually the same distinction suggested in the part of the last quotation which we have emphasized was adopted by the Second Circuit in an opinion by Judge Frank the [fol. 647] year before the decision in *Bisso*. *North River Barge Line* v. *Chile S.S. Co.*, 2 Cir., 1954, 213 F. 2d 882. The Southern District of New York has since held that the strictures of *Bisso* is not applicable to invalidate an exculpatory clause where the tower had undertaken to tow a scow in an ice-clogged river. The district court said:

"Here, the tower, perceiving that there was unusual danger in towing in ice, made it a condition of his assuming a contract of towage that he be spared the difficulty and expense of defending himself in lawsuits resulting from accidents which were likely to result in the extrahazardous situation into which the tow owner

had voluntarily put his property. Accordingly, the strictures of the Bisso case is not applicable to the limited relief from liability at issue."

Chile Steamship Co. v. *The Justine McAllister*, S.D. N.Y., 1958, 168 F. Supp. 700, 702.

The rationale of the rule in *Bisso* was thus expressed in the opinion of the Court:

"The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."

Bisso v. *Inland Waterways Corp.*, *supra*, 349 U. S. at 91. [fol. 648] Reason (1) is inapplicable to the facts of the present case upon much the same ground as that expressed in *Southwestern Sugar & Molasses Co., Inc.* v. *River Terminals Corp.*, *supra*. Reason (2) is clearly inapplicable to the facts of this case. Crescent's acquiescence in Dixilyn's rejections of two exculpatory provisions indicates that there was no economic pressure exercised by Crescent in the negotiation of the contract. The evidence showed that Crescent had competition on movements of this kind from three harbor towing companies in New Orleans and from others in Mobile and in the Galveston-Houston area. Crescent was in no position to overreach Dixilyn or to drive a hard bargain. We conclude that, under all of the circumstances of this case, the *Bisso* rule is not applicable to prevent Dixilyn from indemnifying Crescent against third-party claims based on Crescent's negligence or to prevent Dixilyn from binding itself to afford Crescent the benefit of Dixilyn's liability insurance.

It was stipulated that Crescent carried hull insurance and protection and indemnity insurance on the tug Orleans in an amount more than sufficient to cover the amount of the claims of the libelants in this case. Dixilyn insists that, if it must indemnify Crescent, the measure of damages is the cost of Crescent's insurance and relies on *Standard Oil*

Co. of Texas v. *Wampler*, 5 Cir., 1955, 218 F. 2d 768, 771. In that case, Standard, after being furnished a certificate showing that the policy of insurance secured by Wampler did not protect Standard, made no objection. Judge Allred writing for this Court said:

> "Under these circumstances, it seems to us the [fol. 649] proper measure of damages would be the premiums paid for this insurance.'

'Cf. Capital Life, Ins. Co. v. Driscoll, Tex. Civ. App., 199 S.W. 872, 875."

The Court of Civil Appeals of Texas, in the case cited, had said:

> "Where an applicant contracts for a certain character of insurance policy and such policy is refused, and he can then only obtain a like policy at an increased annual premium, the proper measure of damages; we think, is the difference between the premiums of the policy contracted for and the policy he can get." (199 S.W. at 875.)

In the instant case Crescent had received no notice prior to the collision that Dixilyn had failed to obtain insurance to indemnify it and Crescent against third-party claims whether based on Crescent's negligence or not.[10] This case is therefore distinguishable from *Standard Oil Co. of Texas* v. *Wampler*, *supra*, and Dixilyn is liable to Crescent for the amount, with interest and costs, paid by Crescent to the libelants. The judgment is reversed and the cause remanded for the entry of a judgment consistent with this opinion.

REVERSED WITH DIRECTIONS.

[10] We, of course, intimate no opinion as to whether either Crescent or Dixilyn has a claim against Dixilyn's underwriters since

[fol. 650]

IN UNITED STATES COURT OF APPEALS

No. 19148

CRESCENT TOWING & SALVAGE COMPANY

versus

DIXILYN DRILLING COMPANY

JUDGMENT—May 9, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for the entry of a judgment consistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, Dixilyn Drilling Corporation be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fol. 651] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 652]

SUPREME COURT OF THE UNITED STATES

No. 297—October Term, 1962

DIXILYN DRILLING CORPORATION, Petitioner,

vs.

CRESCENT TOWING & SALVAGE COMPANY

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.